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IN THE

Supreme Court of the United States

October Term, 1967

HOWARD PRICE D/B/A HOWARD PRICE AND COMPANY

Appellant

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS, AS STATE ROAD COMMISSIONER

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JURISDICTIONAL STATEMENT

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Appellant

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS, AS STATE ROAD COMMISSIONER

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JURISDICTIONAL STATEMENT

The subject on appeal in this mandamus proceeding was previously the subject of an appeal to this Court in a declaratory judgment proceeding from the same State Court, on the same Federal questions, and on the Trial Court's similar action of dismissal on the ground it was an action against the state and prohibited by the *state constitutional immunity provision* (previous Jurisdictional Statement, Appendix A). *Howard Price d/b/a etc.* v. *State Road Commission of West Virginia et al*, 382 U. S. 20 (1965).

On Appellees' Motion To Dismiss Appeal in the previous proceeding, the Attorney General of West Virginia *represented to this Court that Appellant had available in the State Court an adequate remedy in the form of this mandamus proceeding to compel the institution of eminent domain*

proceedings to acquire Appellant's property which was appropriated by the State Road Commission. (Motion To Dismiss Appeal in previous proceeding, Appendix B). This Court sustained Appellee's Motion and dismissed the appeal in the previous proceeding *"in the light of the representations of the Attorney General of West Virginia, that Appellant had an effective State procedure of which he had not availed himself"*. (382 U.S. 20, Appendix C). Pursuant to the representations of the Attorney General to this Court, Appellant instituted this *mandamus proceeding to compel the institution of eminent domain proceedings.* Appellees by demurrer in this mandamus proceeding then *repudiated* the representations of Attorney General to this Court, and *on the same grounds* on which it dismissed the declaratory judgment proceeding, the Trial Court *dismissed this mandamus proceeding.* The subject matter and same Federal questions now come again before this Court. This controversy has been in the Courts since May 24, 1963.

Appellant, Howard Price, dba Howard Price and Company, appeals from the judgment of the Circuit Court of Kanawha County, West Virginia, entered on June 25, 1966, dismissing Appellant's petition in mandamus on the ground it constituted a suit against the State of West Virginia. On petition for writ of error timely filed, the Supreme Court of Appeals of West Virginia, by order entered December 5, 1966, refused to review the judgment; and on a second petition timely filed, said Court by order entered February 20, 1967, again refused to review the judgment and returned the record to the Circuit Court of Kanawha County. The time for re-petitioning for writ of error has expired. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial Federal questions are presented.

OPINION BELOW

The letter opinion of the Circuit Court of Kanawha County, West Virginia, dated March 11, 1966, is not re-

ported. A copy of the opinion was made part of the record in the proceeding and is attached hereto as Appendix D.

JURISDICTION

Appellant filed his petition in mandamus in the Circuit Court of Kanawha County, West Virginia, on January 5, 1966. The petition sought to compel the State Road Commission of West Virginia and the Road Commissioner to institute eminent domain proceedings to acquire Appellant's materials, work, labor and services incorporated into a public highway pursuant to a construction contract and which property of Appellant was appropriated by the Road Commission and the Road Commissioner without payment. It asked for other appropriate relief, including alternatively, a declaration of the rights of Appellant under the highway construction contract and upon such declaration of rights, compulsion of the Road Commissioner to perform his statutory duty to audit Appellant's claim for work and materials performed and supplied. By the alternative prayer for relief, appellant incorporated in this mandamus proceeding a prayer for a declaration of rights such as was sought in the previous declaratory judgment proceeding, which in effect, again submits the propriety of declaratory relief for judicial consideration. On June 25, 1966, the Court entered its final judgment order sustaining Appellees' demurrer and dismissed the proceeding as a suit against the State. This is the judgment upon which review is sought (Appendix E).

Appellant thereupon filed his petition for writ of error to the Supreme Court of West Virginia on August 24, 1966. On December 5, 1966, the Supreme Court of Appeals of West Virginia entered its order refusing to review the case (Appendix F) and on second petition for writ of error, said Court on February 20, 1967, again refused to review the case (Appendix G). The time for re-petitioning had expired and the record was returned to the Circuit Court of Kanawha County.

Notice of appeal to the Supreme Court of the United States was filed with the Circuit Court of Kanawha County on April 17, 1967.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Circuit Court of Kanawha County, West Virginia, on appeal is conferred by Title 28, United States Code Section 1257(2). The application of a state constitutional provision as against the contention of its repugnancy to the Fourteenth Amendment and the commerce clause of Section 8, Article I, of the Federal Constitution, on the facts of the case, is within the purview of such section *Torcaso* v. *Watkins*, 367 U.S. 488; *Delmas* v. *Merchants Mutual*, 14 Wall 611; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481; *U. S.* v. *County of Allegheny*, 322 U.S. 174; *Tregea* v. *Modesto Irr. Dist.*, 164 U.S. 176. The Circuit Court of Kanawha County was the highest court in which a decision could be had. *Virginia R. Co.* v. *Mullens*, 271 U.S. 220.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Parden* v. *Terminal Railway of Alabama State Docks Department*, 377 U.S. 184; *Land* v. *Dollar*, 330 U.S. 731; *U.S.* v. *Lee*, 106 U.S. 196; *Tindal* v. *Wesley*, 167 U.S. 204; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226; *Rolston* v. *Crittenden*, 120 U.S. 390; *Sterling* v. *Constantin*, 287 U.S. 378; *Board of Liquidation* v. *McComb*, 92 U.S. 531; *West* v. *Chesapeake and P. Tel. Co.*, 295 U.S. 662; *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530; *Payne* v. *Central P. R. Co.*, 255 U.S. 228; *Ickes* v. *Fox*, 300 U.S. 82.

STATE CONSTITUTIONAL PROVISIONS INVOLVED

1. Constitution of West Virginia, 1872 (as contained in Official Code of West Virginia, 1931, p. xlix), as Amended by House Joint Resolution No. 3, Acts and Resolutions of

the 42nd Legislature of West Virginia, Regular Session 1935, p. 662; Chapter 23, same volume, p. 134, submitted to voters; Ratified 1936. (The amendment added an exception pertaining only to garnishment which is not here relevant):

ARTICLE VI

* * *

STATE NOT TO BE MADE DEFENDANT IN ANY COURT

§35: *The State of West Virginia shall never be made defendant in any court of law or equity,* * * * (Italics supplied).

* * *

2. Constitution of West Virginia, 1872, as Amended by House Joint Resolution 6, Acts of the 45th Legislature of West Virginia, Regular Session 1941, p. 589; Chapter 11, same volume, p. 89, submitted to voters; Ratified November, 1942, adding Section 52, Article VI. This section is also pertinent. It establishes the State Road Fund, directs that all revenues from highway users be paid into it, and provides that it be used for the "payment of obligations incurred in the construction . . . of public highways." (See Appendix H for text).

* * *

STATE STATUTES INVOLVED

Section 1, Article 2, Chapter 17 of the Code of West Virginia, 1931, as amended by the Acts of the Legislature of West Virginia as indicated after the section. (Note: Last official code of West Virginia published in 1931. Only official source of amendments thereto is in Legislative Acts. Michie's West Virginia Code (unofficial) conveniently compiles all sections and amendments thereto by the official code section, article and chapter designation):

ARTICLE 2. STATE ROAD COMMISSION

Section 1. STATE ROAD COMMISSION; PURPOSES AND RESPONSIBILITIES. — The State Road Commission of West Virginia, heretofore created and *existing as a corporation*, shall be and is hereby continued as in this article provided. The commission is hereby authorized and empowered to adopt and use a seal; *to negotiate and enter into contracts; to institute, prosecute and defend suits, actions and proceedings;* and to otherwise exercise all powers and functions necessary and germane to its public corporate existence and purposes (Chapter 143, Acts of the Legislature of West Virginia, Regular Session, 1957, pp. 669; Chap. 17, Art. 2, Sec. 1 of Michie's West Virginia Code (1966), p. 7) (Italics supplied.)

* * *

2. The following statutes are also pertinent as pertaining to the State Road Fund, its use to pay the cost of road construction, the methods of disbursements therefrom, including the Road Commissioner's duty to audit contractors' claims and issue requisitions for their payment; and the direction that road construction shall be performed under contract awarded by bid and bonded, giving detailed statutory requirements:

Chapter 17, Code of West Virginia, 1931, as amended:

Article 3, Sections 1, 2 and 4

Article 4, Sections 19, 20 and 21

(See Appendix I for pertinent parts of above sections, and official reference to amending Acts of the Legislature)

QUESTIONS PRESENTED

After the appeal in the previous declaratory judgment proceeding was expressly dismissed by this Court on Appellees' representations that mandamus to compel eminent domain proceedings was Appellant's effective state remedy

(more fully set forth in opening paragraphs of this Jurisdictional Statement, pp. 1, 2), Appellant, a highway contractor, filed a petition in mandamus against Appellees, The Road Commission and Road Commissioner, to compel them to institute eminent domain proceedings to legally acquire his property in the form of material, work, services, and labor incorporated into a public highway pursuant to a highway construction contract between Appellant and Appellees. Appellant alleged he had completed 80% of the contract, that his working time was not expired, that the Appellees, by arbitrary actions and without legal authority, stopped Appellant's performance, abrogated his contract without paying him for all the work performed by him, and appropriated his material and services of a worth of $1,387,-046.55 incorporated into a public highway which was part of the Federal Interstate System.

Appellees then repudiated their representations to the U. S. Supreme Court and again claimed State immunity by demurrer to Appellant's petition. The petition in mandamus in addition to seeking to compel Appellees to institute eminent domain proceedings, asked also for other appropriate relief, including alternatively, a declaration of the rights of the parties, as sought in the previous declaratory judgment proceeding. On Appellees' demurrer, the trial Court again held the proceeding was against the State of West Virginia and absolutely prohibited. In the premises, the questions presented are:

1. Were the actions of the Road Commission as alleged and the action of the trial Court, in applying the immunity provision of the State Constitution and dismissing the mandamus and alternative declaratory judgment proceeding, repugnant to:

(1) Section 1 of the Fourteenth Amendment to the Federal Constitution on the grounds that they:

(a) constituted a denial of due process of law by the State?

(b) constituted the taking by the State of private property for public use without just compensation?

(c) constituted a denial by the State of equal protection of the law?

(2) Section 8, Article I, of the Federal Constitution on the grounds that they constituted an interference with and burden upon interstate commerce?

2. Does the application by the trial Court, on Appellees' demurrer, of the immunity provision of the State Constitution to Appellant's petition for mandamus and alternatively a declaration of rights, and without further proceeding on the merits, constitute a denial of due process of law under the Fourteenth Amendment of the Federal Constitution?

HOW FEDERAL QUESTIONS ARE PRESENTED

The Federal questions are initially presented by Appellant's mandamus petition (Appendix J). The mandamus petition alleges in part as follows (Appendix J, p. 107a):

> "That said Road Commission and Road Commissioner are respectively a public instrumentality and a public official of the State and charged with the solemn *duty to abide by and uphold the Constitution * * * of the United States, and in the performance of their duties to so act and conduct themselves in such manner as not to deprive any person of life, liberty, or property without due process of law as required by Section 1 of the Fourteenth Amendment to the Federal Constitution * * * nor to take private property for public use without just compensation as required by the Fifth Amendment to the Federal Constitution (as made applicable to the States by the Fourteenth Amendment as aforesaid)* * *. In pursuance of the duties aforesaid, it is the further duty of said Road Commission and Road Commissioner, to institute proceedings under the authority of eminent domain to legally acquire and to pay just compensation for

private property taken and appropriated by them for public use." (Emphasis supplied)

After alleging the property appropriated by the Appellees, the mandamus petition further charges (Appendix J, p. 126a):

> " * * * that Respondents, NOTWITHSTANDING their duties *not to deprive Petitioner of his property without due process and not to take such property for public use without just compensation as guaranteed by the Federal constitutional provisions aforementioned,* did wrongfully abrogate said contract and deprive Petitioner of his property right therein, and did wrongfully take and appropriate his work, services, labor, and materials incorporated in the public highway and deprive Petitioner of his property therein without due process and did take same for public use *without just compensation in violation of the Federal constitutional provisions* aforementioned, and NOTWITHSTANDING Respondents' further duty, * * * have refused to perform their duty to institute proceedings in eminent domain to legally acquire such property from Petitioner and pay him just compensation therefor. (Emphasis supplied)

Appellees filed a demurrer and an answer to the petition, the salient point of which was that the proceeding was a suit against the State of West Virginia and prohibited by the immunity provision of the State Constitution. No responsive pleading to a demurrer is permissible. To Appellees' answer, Appellant filed a demurrer and a reply which again set forth the Federal grounds as follows (Record pp. 144, 151):

> "(1) Petitioner's rights are grounded on Section 1 of the Fourteenth Amendment and on the Fifth Amendment to the Federal Constitution as made applicable to the States by the Fourteenth Amendment, and the gravamen of said petition is the violation of Petitioner's property rights protected thereby, and any application of the immunity provision of the State Constitution to the facts of this case and

> the protection of Petitioner's property rights is repugnant to the rights guaranteed to Petitioner by the Federal Constitution as aforesaid and would deprive Petitioner of his property without due process and constitute a taking of private property for public use without just compensation."

The trial Court issued its opinion by letter dated March 11, 1966, and entered its final order in conformity therewith sustaining Appellees' demurrer and dismissing the proceeding on the ground that it was an action against the State of West Virginia. The trial Court noted Appellant's constitutional arguments in its opinion (Appendix D, page 89a) stating:

> "* * * The Petitioner here strongly contends and argues that Article VI, Section 35, of the Constitution of West Virginia contravenes the provisions of the United States Constitution forbidding the denial of due process of law, and the provisions of the Federal and State Constitutions inhibiting the taking of private property without just compensation and denying equal protection of the law, as applied to this petitioner."

The Appellant's objections to the Court's ruling and his reasons therefor were noted in the final order itself (Appendix E, p. 96a). The reasons embracing Federal grounds read as follows:

> "1. The application by the Court to this case of Section 35, Article VI, of the Constitution of West Virginia is repugnant to Section 1 of the Fourteenth Amendment to the Federal Constitution, and to the Fifth Amendment to the Federal Constitution as made applicable to the States by the Fourteenth Amendment of the Federal Constitution, in that it constitutes a denial of due process of law and a denial of the equal protection of law, deprives the Petitioner of his property without due process of law, and constitutes the taking of private property for public use without compensation."

"2. The State has consented to suit against Respondents by its participation of the subject highway project in the Federal Interstate Highway Program, and the application by the Court to this case of Section 35, Article VI, of the Constitution of West Virginia is repugnant to the commerce clause of Section 8, Article I, of the Federal Constitution, in that it constitutes an interference with and burden upon interstate commerce."

Appellant continued to raise the Federal questions in the Assignment of Errors in each of his petitions for writ of error (Record, pp. 9, 31) to the Supreme Court of West Virginia, the pertinent parts of which read almost verbatim the objections set forth in the final order as above.

The objections and the assignments of errors were denied by the Circuit Court of Kanawha County and the Supreme Court of Appeals of West Virginia, respectively.

STATEMENT OF THE CASE

Appellant's petition in the trial Court alleges (Appendix J, p. 105a) the previous proceeding, the appeal thereof to this Court, the representations therein made by Appellees that mandamus was the proper remedy, and the action of this Court in dismissing the appeal in the light of such representations, all of which is more fully set forth in the opening paragraphs of this Jurisdictional Statement.

The petition further alleges as follows. That Appellees have the constitutional duty not to deprive any person of property without due process of law or to take property for public use without compensation, and in the premises of such constitutional duties, upon the appropriation of private property for public use, the further duty to institute eminent domain proceedings to legally acquire it and pay for it. (Appendix J, p. 107a).

The petition further alleges that Appellant entered into the highway construction contract with the Road Commission for the construction of a portion of Interstate Highway

64 (Appendix J, p. 108a). There is also set forth: the various statutory authorities and duties of the Road Commissioner to enter into such contracts, audit the claims for work, and issue requisitions for the payment thereof from the State Road Fund (Appendix J, p. 106a); pertinent contract provisions that the Appellant was to be paid monthly estimates (Appendix J, p. 109a); that Appellant would be paid the contract bid price for the actual quantities necessary to complete the project, and a fair and reasonable price for items necessary and not included in the original contract (Appendix J, p. 109a); and that the work was under the supervision and control of the Commissioner and his engineers, who had authority to suspend work if his orders were not carried out (Appendix J, p. 109a). The items of work involved in this action, the prices, and the quantities thereof, both as planned and as performed by Appellant, were described in detail (Appendix J, p. 110a), alleging that such work, services, labor and materials were property within the protection of the Federal constitutional guarantees and the constitutional duties of Appellees not to appropriate them for public use without just compensation.

Appellant was not paid by monthly estimates as required by the contract. The total amount still due for his work, services, labor and materials performed and now incorporated into the highway, and being the value of Appellant's property, is $1,387,046.55, which the Road Commissioner without right or authority, has refused to audit and certify for payment, and has refused to institute eminent domain proceedings to legally acquire (Appendix J, p. 126a). (The Appellees' affidavits in the previous proceeding admitted that Appellant had not been paid for all his work.)

The complaint further alleges numerous instances of arbitrary orders, contradictory orders, and capricious conduct on the part of Appellees, forcing Appellant to perform his work under conditions of hinderance, harassment, and delay. All of such arbitrary and contradictory orders were issued

by the Appellees under threats, either express or implied, of work suspension if not complied with by Appellant (Appendix J, p. 112a).

When Appellant had performed approximately 80% of the work (Appendix J, p. 112a), and was insistent that the Road Commission pay him the monthly estimates for work performed and otherwise abide by its contract, the Road Commissioner arbitrarily and without legal justification publicly declared his progress was unsatisfactory and his contract in default (Appendix J, p. 112a, 123a, 124a). Although requested so to do, the Road Commissioner, over Appellant's protests, terminated his work, ordered him off the project, and removed the Commission engineer, so he could proceed no further (Appendix J, p. 123a). Appellant was not in default (Appendix J, p. 125a), and at the time he was removed from the project, Appellant's working time had not expired. (The Road Commissioner re-let the contract to another contractor.)

The majority of Appellant's contracts have been with the State Road Commission of West Virginia. Prior to the contract here involved, he has never had a contract declared in default, and in his 36 years of experience with the State Road Commission, it has never expressed any dissatisfaction with the performance of his contracts.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

1. The decision of the trial Court refuses to follow the decision of this Court by permitting Appellees to repudiate the representations made to and relied upon by this Court on the previous appeal, 382 U.S. 20 (1965).

2. The appeal to this Court in the previous declaratory judgment proceeding was on the same Federal questions arising from the application of the immunity provision of the State Constitution. Appellees, through the State Attorney General, represented in their motion to dismiss that "Appellant's proper and still available course was . . .

to institute * * * mandamus to compel Eminent Domain proceedings." (Appendix B, p. 79a). This Court dismissed such appeal expressly in the light of such representation. By demurrer to this mandamus proceeding, Appellees repudiated their representations to this Court, and again asserted the State Constitutional immunity provision. The trial Court held that the Appellees' representations and this Court's dismissal expressly in the light thereof did not become the law of the case, and that Appellees were not estopped by the record to again assert immunity. This holding is contrary in principle to the decisions of this Court in *Cowley* v. *Northern P. R. Co.*, 159 U.S. 569; *Fisher* v. *Shropshire*, 147 U.S. 133; *Davis* v. *Wakelee*, 156 U.S. 680; *Fletcher* v. *Peck*, 6 Cranch 87, 137; *The New Philadelphia (Camden & A. R. Transport Co.* v. *Brady)*, 1 Black 62.

3. The importance of these questions is of grave and immediate concern to all highway contractors doing business with the Road Commission. All highway construction in West Virginia is under the control of the Road Commission through the Road Commissioner, who undertakes it through contracts with private concerns. The Road Commissioner, by law, is vested with extensive powers. With the expanding program in this State, he is entrusted with the expenditure of large sums of money and the control and responsibility for many and large construction projects. In the fiscal year 1965-66, the Road Commissioner spent *36.28% of all funds spent by the State of West Virginia* (Official West Virginia Blue Book, 1966, p. 920) being the largest expenditure by the State for any one function. *If the Road Commissioner, under the facts of the case, can with the State's immunity shield his actions in dealing with these contracts and the handling of these large sums of money, the consequences are far-reaching.* The trial Court's decision would sanction actions under color of office, whether intentional or unintentional, detrimental not only to the contractors, but to the road building program of this State and its general political and governmental well-being. It

allows the state's immunity to become an instrument of favoritism, a tool of oppression, and a cloak for incompetence.

4. These questions are equally important to the citizens of this State who by State Constitutional mandate creating the State Road Fund, have earmarked for the Road Commission all revenue from highway users for the construction and maintenance of highways. *Similarly, it is important to the Federal government, which in promoting its national highway system, furnishes participating funds for projects undertaken by the Road Commission, the contracts for which are handled by the Road Commissioner.* 90% of the cost of the Interstate project here involved was paid for by the Federal government. The Road Commission is utilized by the Federal government as its agent in the exercise of its Constitutional functions in effecting its national highway policy. The construction of these contracts, their consequences, the rights and obligations of the parties, present a question of Federal law within the principle enunciated by this Court in *U. S.* v. *Allegheny County*, 322 U.S. 174.

If the Road Commission and the Road Commissioner are allowed to successfully resist judicial determinations of controversies that may arise with the contractors, so that the contractors are unable to secure an impartial adjudication of their rights under their contracts and the protection of their property, and as may be necessary, a compulsion of the Road Commissioner to perform his official duties, the inevitable consequence is that all contractors must price their services on all contracts in such manner as will protect them from loss on one contract through arbitrary and unlawful actions by highway officials under the color of their offices. In the last analysis, this poses a wasteful drain upon the funds provided for the purpose by both State and Federal governments. (The trial Court noted its personal opinion (Appendix D, p. 93a) that "the doctrine of *immunity*

. . . *as stated in our Constitution, is archaic* and completely out of step with the times, when we observe the government, state and federal, engaging in big business"):

5. The actions of both the Road Commissioner as alleged and of the trial Court in its dismissal, are both State action within the meaning of the Fourteenth Amendment (*Shelley* v. *Kraemer*, *McGhee* v. *Sipes*, 334 U.S. 1). Appellant's work, material, and services already performed and incorporated into the public highway, and his rights under the contract are "property" within the protection of the due process and equal protection of law provisions of the Fourteenth Amendment (*Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530; *West* v. *Chesapeake and Potomac Tel. Co.*, 295 U.S. 662; *Monongahela Navigation Co.* v. *U. S.*, 148 U.S. 312; *U. S.* v. *GMC*, 323 U.S. 373; *U. S.* v. *Peewee Coal Co.*, 341 U.S. 114. The taking of property for public use is comprehended both in the meaning of the due process clause of the Fourteenth Amendment and of the Fifth Amendment as made applicable to the State by the privileges and immunities clause of the Fourteenth Amendment (*West* v. *C. & P. Tel. Co.*, 295 U.S. 662; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226; *Martin* v. *Creasey*, 360 U.S. 219.

6. This is a suit against the State Road Commissioner for wrongfully exceeding his authority in appropriating Appellant's property under color of office, and for failing to perform his Constitutional duty to legally acquire it through eminent domain proceedings. In this respect, the holding of the lower Court in refusing mandamus is in conflict with the decisions of this Court in *Rolston* v. *Crittenden*, 120 U.S. 390; *Payne* v. *Central P. R. Co.*, 255 U.S. 228; *Ickes* v. *Fox*, 300 U.S. 82; *Board of Liquidation* v. *McComb*, 92 U.S. 531; and *Noble* v. *Union River Logging Company*, 147 U.S. 165; and contrary in principle to *Sterling* v. *Constantin*, 287 U.S. 378.

7. *Mahone* v. *State Road Commission*, 99 W. Va. 397, 129 S.E. 320, decided in 1925 by the State Supreme Court,

held that the statute authorizing the Road Commission as a body corporate, to be sued, violated the State Constitutional prohibition that the State should never be made a party defendant. In *Stewart* v. *State Road Commission*, 117 W. Va. 352, 185 S.E. 567 (1936), and other cases, the State Supreme Court further held that this immunity was *absolute* and could never be waived by the Legislature, nor could the State or any of its instrumentalities ever consent to be sued. Despite these decisions, when the statute was amended in 1957, the Legislature nevertheless did not delete the consent to be sued, *but on its reenactment reaffirmed its position that the Road Commission could sue and be sued.* These judicial holdings *impose a stringency in excess of the common law doctrine of immunity.* Under such holdings, it is impossible to give consent, although in fact *the Legislature has consented to suits against the Road Commission.* Such holdings, as against the assertion of a Federal right, constitutional or statutory, are in conflict with the decision of this Court in *Parden* v. *Terminal Railway of Alabama State Docks Department*, 377 U.S. 184. It is likewise in conflict with *Lawrence* v. *State Tax Commission*, 286 U.S. 276, for the Federal Constitutional guarantee of due process likewise insures the privilege to have that right judicially declared and protected.

8. The trial Court, in ruling on appellees' *demurrer*, took the position that by virtue of the decisions of the State Supreme Court, this mandamus proceeding was subject to the same infirmity as the previous declaratory judgment proceeding; was an action against the State; and "merely a further effort on the part of the Petitioner to enforce a right which under the West Virginia Constitution, he cannot enforce in this proceeding. . ." (Trial Court Opinion, Appendix D, p. 94a). The trial Court's ruling in this respect, without the taking of evidence on the merits so as to determine whether the proceeding was against the State or the Road Commissioner, is in conflict with this Court's de-

cision in the cases of *Land* v. *Dollar*, 330 U.S. 731; *U. S.* v. *Lee*, 106 U.S. 196; *Tindal* v. *Wesley*, 167 U.S. 204.

9. Inherent in the trial Court's opinion was its opinion in the previous declaratory judgment proceeding, that the proceeding was against the State in view of the fact that to compel the Road Commissioner to perform his duty to institute eminent domain proceedings would set in motion a sequence of events which would ultimately result in the payment of money from the State Road Fund. This holding is contrary in principle to the decision of this Court in *Houston* v. *Ormes*, 252 U.S. 469.

The State Road Fund by constitutional provision is a special fund and not part of the general revenue; it consists of the revenues from highway users, the use of which is solely restricted to the construction and maintenance of highways; and the payments therefrom are held not to be on debts of the State. (*State Road Commission* v. *O'Brien*, 140 W. Va. 114, 82 S.E. 2d 903)

10. These Federal questions are substantial to Appellant not only because of the extent of the property of which he has been deprived, but also because *the Road Commissioner has deprived him of the right to earn a livelihood in his chosen occupation.* Highway construction contracts are required to be bonded and *it is impossible for Appellant to secure the necessary bonds for any work as long as the Commissioner's action in abrogating his contract stands unresolved.*

11. On demurrer, the allegations of Appellant's petition must be assumed to be true, *Ickes* v. *Fox*, 300 U.S. 82, 96. The facts alleged are that the Road Commissioner, by refusing to institute eminent domain proceedings, has appropriated $1,387,046.55 of Appellant's property as incorporated in the public highway, without compensation to Appellant. *Appellant has been deprived of his property for public use, denied his compensation therefor, and re-*

fused the opportunity to establish his rights. Appellant has not had his day in Court, he has not had the due process of law.

CONCLUSION

The questions presented on this appeal are of public importance, affecting the State and Federal highway construction program and the highway construction industry. They comprehend the required extent of governmental morality, the accountability of State officials, and the necessary balance between the prerogative of governmental authority and the Constitutional rights of the individual. Appellant submits that the precedents established by this Court do not support the decision of the Circuit Court of Kanawha County, but require its reversal, and that the questions presented are so substantial as to require plenary consideration with brief on the merits and oral argument, for their resolution.

April 25, 1967

Respectfully submitted,

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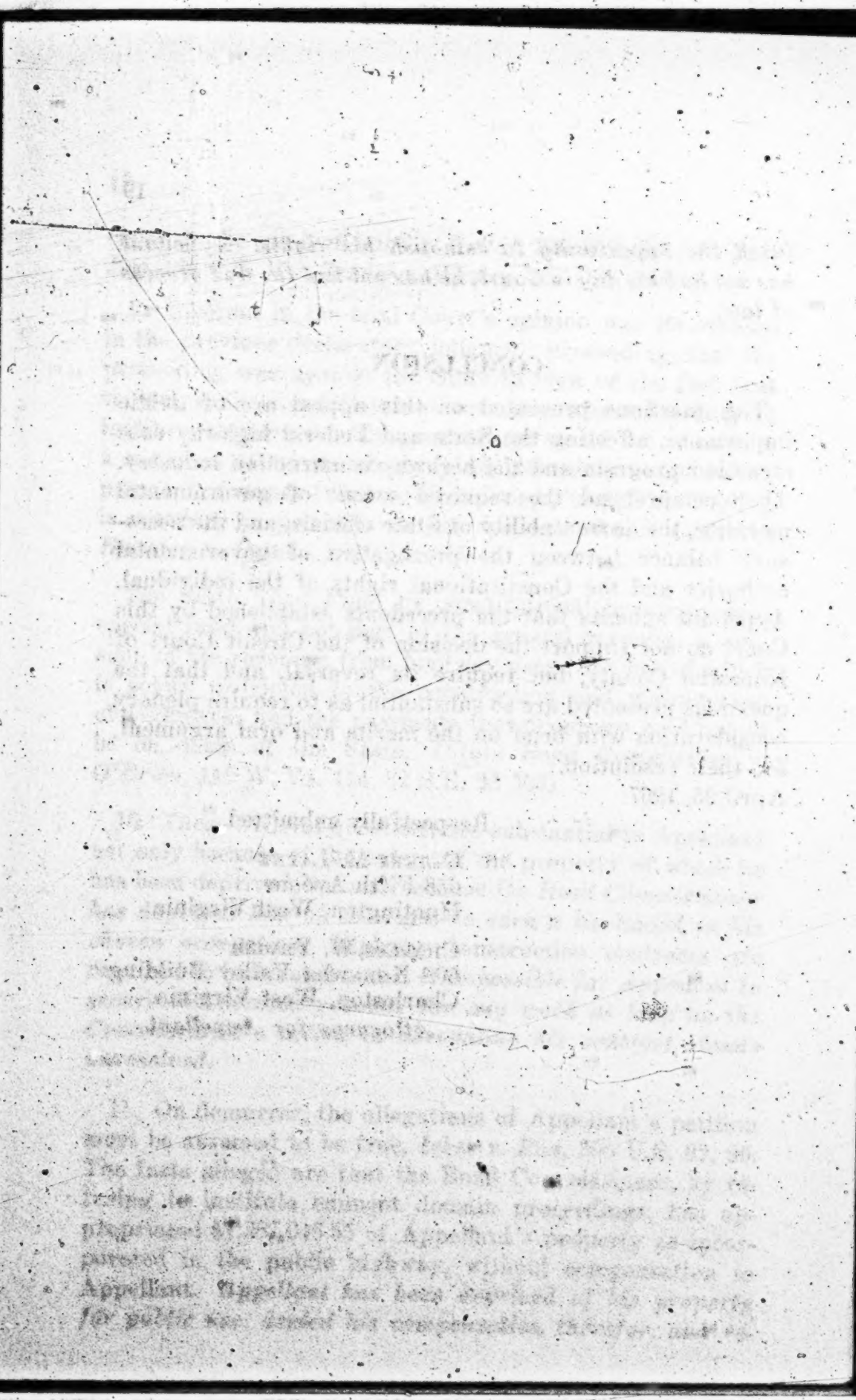

No. ——

IN THE

Supreme Court of the United States

October Term, 1964

HOWARD PRICE D/B/A HOWARD PRICE AND COMPANY

Appellant

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, BURL A. SAWYERS, AS STATE ROAD COMMISSIONER, AND WILSON H. WARD, AS DIRECTOR OF THE CONSTRUCTION DIVISION, STATE ROAD COMMISSION OF WEST VIRGINIA

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JURISDICTIONAL STATEMENT

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Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JURISDICTIONAL STATEMENT

Appellant Howard Price d/b/a Howard Price and Company, appeals from the judgment of the Circuit Court of Kanawha County, West Virginia, entered on May 19, 1964, dismissing Appellant's complaint on the ground it constituted a suit against the State of West Virginia. On petition timely filed, the Supreme Court of Appeals of West Virginia, by order entered February 22, 1965, refused to review the judgment and returned the record to the Circuit Court of Kanawha County. The time for re-petitioning has expired. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINION BELOW

The letter opinions of the Circuit Court of Kanawha County, West Virginia, dated November 7, 1963, and April 13, 1964, are not reported. Copies of the opinions are attached hereto as Appendix A and B respectively.

JURISDICTION

Appellant filed his declaratory judgment complaint in the Circuit Court of Kanawha County, West Virginia, on May 24, 1963, pursuant to Chapter 26, Acts of the West Virginia Legislature, Regular Session 1941, p. 132, (Appendix C), being Chapter 55, Article 13, Code of West Virginia, 1931, as amended, and Rule 57 of the West Virginia Rules of Civil Procedure, 144 W. Va. Reports, p. xcviii, (Appendix D). The complaint sought a declaratory judgment as to the rights of Appellant under a highway construction contract entered into by him with the State Road Commission of West Virginia, asking: (1) that the rights of the parties be declared; and sequentially, (2) that after a declaration of rights, the Road Commissioner be compelled to perform his statutory duty to audit Appellant's claim for work performed by Appellant.

On May 19, 1964, the Court entered its final judgment order sustaining Appellees' motion to dismiss the proceeding as a suit against the State. It is the judgment upon which review is sought (Appendix E).

Appellant thereupon filed his petition for appeal to the Supreme Court of West Virginia on December 30, 1964. On February 22, 1965, the Supreme Court of Appeals of West Virginia entered its order refusing to review the case. The time for repetitioning had expired and the record was returned to the Circuit Court of Kanawha County.

Notice of appeal to the Supreme Court of the United States was filed with the Circuit Court of Kanawha County on April 24, 1965.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Circuit Court of Kanawha County, West Virginia, on appeal is conferred by Title 28, United States Code Section 1257(2). The application of a state constitutional provision as against the contention of its repugnancy to the Fourteenth Amendment on the facts of the case, is within the purview of such section *Torcaso* v. *Watkins*, 367 U.S. 488; *Delmas* v. *Merchants Mutual*, 14 Wall. 661; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481; *U. S.* v. *County of Allegheny*, 322 U.S. 174; *Tregea* v. *Modesto Irr. Dist.*, 164 U.S. 176. The Circuit Court of Kanawha County was the highest court in which a decision could be had. *Virginia R. Co.* v. *Mullens*, 271 U.S. 220.

The cause presents a justiciable controversy and meets the conditions which establish the validity of the declaratory procedure as set forth in *Nashville C. & St. L. R. Co.* v. *Wallace*, 288 U.S. 249 and *Evers* v. *Dwyer*, 358 U.S. 202.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Land* v. *Dollar*, 330 U.S. 731; *U. S.* v. *Lee*, 106 U.S. 196; *Tindal* v. *Wesley*, 167 U.S. 204; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226; *Rolston* v. *Crittenden*, 120 U.S. 390; *Sterling* v. *Constantin*, 287 U.S. 378; *Board of Liquidation* v. *McComb*, 92 U.S. 531; *West* v. *Chesapeake and P. Tel. Co.*, 295 U.S. 662; *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530; *Payne* v. *Central P. R. Co.*, 255 U.S. 228; *Ickes* v. *Fox*, 300 U.S. 82.

STATE CONSTITUTIONAL PROVISIONS INVOLVED

1. Constitution of West Virginia, 1872 (as contained in Official Code of West Virginia, 1931, p. xlix), as Amended by House Joint Resolution No. 3, Acts and Resolutions of the 42nd Legislature of West Virginia, Regular Session 1935, p. 662; Chapter 23, same volume, p. 134, submitted

to voters; Ratified 1936. (The amendment added an exception pertaining to garnishment):

ARTICLE VI

* * *

STATE NOT TO BE MADE DEFENDANT IN ANY COURT

§35: *The State of West Virginia shall never be made defendant in any court of law or equity,* * * * (Italics supplied).

* * *

2. Constitution of West Virginia, 1872, as Amended by House Joint Resolution 6, Acts of the 45th Legislature of West Virginia, Regular Session 1941, p. 589; Chapter 11, same volume, p. 89, submitted to voters; Ratified November, 1942, adding section 52, Article VI. This section is also pertinent. It establishes the State Road Fund, directs that all revenues from highway users be paid into it, and provides that it be used for the "payment of obligations incurred in the construction . . . of public highways." (See Appendix F for text).

* * *

STATE STATUTES INVOLVED

Section 1, Article 2, Chapter 17 of the Code of West Virginia, 1931, as amended by the Acts of the Legislature of West Virginia as indicated after the section. (Note: Last official code of West Virginia published in 1931. Only official source of amendments thereto is in Legislative Acts. Michie's West Virginia Code of 1961 (unofficial) and the 1964 Supplement thereto conveniently compiles all sections and amendments thereto by the official code section, article and chapter designation).

ARTICLE 2. STATE ROAD COMMISSION

Section 1. STATE ROAD COMMISSION; PURPOSES AND RESPONSIBILITIES. — The State

Road Commission of West Virginia, heretofore created and *existing as a corporation*, shall be and is hereby continued as in this article provided. The commission is hereby authorised and empowered to adopt and use a seal; *to negotiate and enter into contracts; to institute, prosecute and defend suits, actions and proceedings;* and to otherwise exercise all powers and functions necessary and germane to its public corporate existence and purposes (Chapter 143, Acts of the Legislature of West Virginia, Regular Session, 1957, pp. 669; Chap. 17, Art. 2, Sec. 1 of Michie's West Virginia Code of 1961, (Serial Section 1445 (1)), p. 866.) (Italics supplied.)

• • •

2. The following statutes are also pertinent as pertaining to the State Road Fund, its use to pay the cost of road construction, the methods of disbursements therefrom, including the Road Commissioner's duty to audit contractors' claims and issue requisitions for their payment; and the direction that road construction shall be performed under contract awarded by bid and bonded, giving detailed statutory requirements:

Chapter 17, Code of West Virginia, 1931, as amended:

Article 3, Sections 1, 2 and 4

Article 4, Sections 19, 20 and 21

(See Appendix G for pertinent parts of above sections, and official reference to amending Acts of the Legislature)

QUESTIONS PRESENTED

Appellant filed a declaratory judgment complaint against the Road Commission and Road Commissioner asking a declaration of the rights of the parties under a highway construction contract between Appellant and Road Commissioner. Appellant alleged he had completed 80% of the contract; and that the Road Commissioner by arbitrary actions and without legal authority had stopped Appellant's

performance, abrogated his contract without paying him for all the work performed by him, and appropriated his material and services of a worth of $1,338,511.67 as incorporated into a public interstate highway. The Road Commissioner refused to certify for payment the $1,338,511.67 worth of work already performed under the contract and not paid for. As permitted by the West Virginia Rules of Civil Procedure the complaint asks that after the rights were declared, that Appellant be granted coercive relief compelling the Road Commissioner to perform his statutory duty to audit the claim, certify the work, and issue a requisition for its payment from the State Road Fund. On motion to dismiss the Court held the proceeding was against the State of West Virginia and absolutely prohibited. The questions presented are:

1. Were the actions of the Road Commissioner as alleged, and the action of the trial Court, in applying the immunity provision of the State Constitution, and dismissing the proceeding, repugnant to Section 1 of the Fourteenth Amendment to the Federal Constitution on the grounds that they:

   (1) Constitute a denial of due process of law by the State?

   (2) Constitute the taking by the State of private property for public use without just compensation?

   (3) Constitute a denial by the State of the equal protection of the law?

2. Does the application by the State Court of the immunity provision of the State Constitution, to Appellant's complaint, on Appellees' motion to dismiss, and without further proceeding on the merits, constitute a denial of due process of law under the Fourteenth Amendment of the Federal Constitution?

HOW THE FEDERAL QUESTIONS ARE PRESENTED

Appellees filed two successive motions to dismiss the complaint on the ground that the proceeding was a suit

against the State of West Virginia and prohibited by the immunity provision of the State Constitution. The motions were almost verbatim, but there were attached to the second motion affidavits (one 12 pages long) which were in essence a denial of the complaint and filed for the purpose of showing there existed a "substantial controversy of fact" between the parties. It was at this initial stage that the federal questions were raised.

The West Virginia Rules of Civil Procedure allow no responsive pleading to a motion to dismiss, and the federal questions were raised in argument, both orally and by brief, on the motions to dismiss. Appellant argued that the application to this case of the state constitutional provision on immunity, for work, material and services already performed by Appellant, and incorporated into the public highway, and for which the Road Commissioner had no right or authority to refuse to certify, and for which he had a statutory duty to audit, and issue a requisition for payment from the constitutionally established State Road Fund, would deny Appellant the due process and equal protection of law, and allow his property to be taken by the Road Commission for public use without any compensation to him.

The trial Court issued its opinion on the first motion by letter dated November 7, 1963, and on November 16, 1963 entered its order in conformity therewith, overruling said motion insofar as it pertained to the work performed and allowing Appellant to proceed as to declaring the rights for the work already performed and incorporated in the highway.

The trial Court issued its opinion on the second motion by letter dated April 13, 1964, and upon which was entered the final judgment order (Appendix E) sustaining Appellees' motion in its entirety and dismissing the proceeding on the ground that the proceeding was an action against the State of West Virginia.

The trial Court noted Appellant's constitutional arguments in its first opinion (Appendix A, p. 6a) stating:

> "Counsel for the plaintiff argue that the inhibition of Article VI, Section 35 of the Constitution is not absolute but, to the contrary, must be considered in the light of due process provisions of federal and state constitutions."

The Appellant's objections to the Court's ruling and his reasons therefor, were noted in the final order itself. The reasons embracing federal grounds read as follows:

* * *

> "2. The Court's ruling denies Plaintiff the rights guaranteed to him under Section 10, Article I of the Constitution of the United States, and under Section 1, Article XIV of the Amendments to the Constitution of the United States."

* * *

Appellant further raised the federal questions in his Assignments of Errors (Record p. 31) contained in his petition for appeal to the Supreme Court of West Virginia, the pertinent parts of which read as follows:

* * *

> "10. The dismissal of the action denied the Plaintiff the right of due process guaranteed under both the State and Federal Constitutions."
>
> "11. The dismissal of the action denied the Plaintiff the right to receive just compensation for private property taken for public use guaranteed by both the State and Federal Constitutions."

* * *

The objections and the assignment of errors were denied by the Circuit Court of Kanawha County and the Supreme Court of Appeals of West Virginia respectively.

An amplified restatement of these Federal questions appears in the order certifying the existence of Federal

questions and entered by the trial Court on April 24, 1965, (Appendix H), the pertinent parts of which read as follows:

> "... and it hereby is certified and by this order made a part of the record in this case, and of the final order of dismissal heretofore entered herein, that under the West Virginia Rules of Civil Procedure, no responsive pleading is permitted to a motion to dismiss; that in the arguments made in this Court on behalf of the Plaintiff, upon Defendants' motions to dismiss, it was insisted and relied upon by said Plaintiff, that the application of Section 35, Article VI of the Constitution of West Virginia to this case would deprive Plaintiff of his property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Federal Constitution, and it became material and necessary to the determination of this case by this Court to determine this question so raised by the Plaintiff: ..."

• • •

STATEMENT OF THE CASE

Appellant's complaint is attached as Appendix I. In essence it alleges as follows. Appellant entered into a highway construction contract with the Road Commission for the construction of a portion of Interstate Highway 64 (Appendix I, p. 32a). There is set forth the various statutory authorities and duties of the Road Commissioner to enter into such contracts, audit the claims for work and issue requisitions for the payment thereof from the State Road Fund. (Appendix I, p. 31a). The Appellee, Wilson Ward, as Director of the Construction Division is a representative and agent of the Road Commissioner. (By stipulation it was agreed that by statutory amendment the duty to audit claims and issue requisitions had been transferred from the Commission Members to the Road Commissioner. The Commission Members were dropped as parties.)

There is set forth pertinent contract provisions that the Appellant was to be paid by monthly estimate; that Appellant would be paid the unit bid price for the actual quanti-

ties necessary to complete the project, and a fair and reasonable price for items necessary and not included in the original contract; and that the work was under the supervision and control of the Commissioner and his engineers who had authority to suspend work if his orders were not carried out (Appendix I, pp. 32-33a). The items of work involved in this action, the prices, and the quantities thereof both as planned and as performed, were described in detail (Appendix I, pp. 33-36a, 38-40a, 42a, 47a).

Appellant was not paid by monthly estimate as required by the contract. *The total amount still due for work performed and now incorporated into the highway is $1,338,511.67, which the Road Commissioner without right or authority has refused to audit and certify for payment.* (Appendix I, p. 470). The Appellees' affidavits in support of their second motion to dismiss admitted Appellant had not been paid for all his work (Record, p. 101).

The complaint further alleges numerous instances of arbitrary orders, contradictory orders, and capricious conduct, on the part of the Appellees, forcing Appellant to perform his work under conditions of hinderance, harassment and delay. All of such arbitrary and contradictory orders were issued by the Appellees under threats, either express or implied, of work suspension if not complied with by Appellant (Appendix I, pp. 35a, 37-41a, 43-44a).

When Appellant had performed approximately 80% of the work (Appendix I, p. 35a), and was insistent that the Road Commission pay him the monthly estimates for work performed, and otherwise abide by its contract, the Road Commissioner arbitrarily and without legal justification publicly declared his progress was unsatisfactory and his contract in default (Appendix I, p. 43a). Although requested so to do, the Road Commissioner refused to rescind this order (Appendix I, 44a). The Road Commissioner, over Appellant's protests, terminated his work, ordered him off the

project, and removed the Commission engineer so he could proceed no further (Appendix I, p. 44a). Appellant was not in default (Appendix I, p. 45a), and at the time he was removed from the project, Appellant's working time had not expired. The Road Commissioner re-let the contract to another contractor (Appendix I, p. 44a).

The majority of Appellant's contracts have been with the State Road Commission of West Virginia. Prior to the contract here involved, he has never had a contract declared in default, and in his 36 years of experience with the State Road Commission it has never expressed any dissatisfaction with the performance of his contracts (Appellant's Reply Affidavit to Appellees' Affidavits, Exhibit J).

Pending the Court's ruling on Appellees' second motion to dismiss, Appellees provisionally filed their answer and a counterclaim asking damages for $750,000. Appellant in turn filed a counterclaim to Appellees' counterclaim, for damages of $2,000,000, on the ground that the filing of the counterclaim by Appellees had waived any question of immunity. Both counterclaims were dismissed in the final order.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented on this appeal involve the underlying questions: (1) whether or not the immunity of the State under West Virginia's peculiar constitutional provision is available as a defense to the Road Commission and the Road Commissioner under the particular allegations of Appellant's complaint and the relief sought therein; and (2) if so, at what stage such a defense can properly be raised.

1. The importance of these questions is of grave and immediate concern to all highway contractors doing business with the Road Commission. All highway construction in West Virginia is under the control of the Road Commis-

sion through the Road Commissioner, who undertakes it through contracts with private concerns. The Road Commissioner by law is vested with extensive powers, and with the expanding highway program in this State, he is entrusted with the expenditure of large sums of money and the control and responsibility for many and large construction projects. *If the Road Commissioner, under the facts of this case, can with the State's immunity shield his actions in dealing with these contracts and the handling of these large sums of money, the consequences are obvious and far-reaching.* It would sanction actions under color of office, whether intentional or unintentional, detrimental not only to the contractors, but to the road building program of this State and its general political and governmental well-being.

2. These questions are equally important to the citizens of this State who by constitutional mandate creating the State Road Fund, have earmarked for the Road Commission all revenue from highway users for the construction and maintenance of highways. *Similarly it is important to the Federal Government, which in promoting its national highway system, furnishes participating funds for projects undertaken by the Road Commission, the contracts for which are handled by the Road Commissioner.* 90% of the cost of the Interstate project here involved was paid for by the Federal Government. In the fiscal year 1961-62 the Road Commissioner spent approximately 30% of all funds spent by the State of West Virginia (Official West Virginia Blue Book, 1963, p. 953).

If the Road Commission and Road Commissioner are allowed to successfully resist judicial determinations of controversies that may arise with the contractors so that the contractors are unable to secure an impartial adjudication of their rights under their contracts, and as may be necessary, a compulsion of the Road Commissioner to perform his official duties, the inevitable consequence is that all contractors must price their services on all contracts in

such manner as will protect them from loss on one contract through arbitrary and unlawful actions by highway officials under the color of their offices. In the last analysis this poses a wasteful drain upon funds provided for the purpose by both the State and Federal governments.

3. The actions of both the Road Commissioner as alleged and of the trial Court in its dismissal, are both state action within the meaning of the Fourteenth Amendment *(Shelley* v. *Kraemer, McGhee* v. *Sipes*, 334 U.S. 1). Appellant's work, material and services already performed and incorporated into the public highway, and his rights under the contract are "property" with the protection of the due process and equal protection of law provision of the Fourteenth Amendment *(Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530; The taking of property for public use is comprehended both in the meaning of the due process clause of the Fourteenth Amendment and of the Fifth Amendment as made applicable to the states by the privileges and immunities clause of the Fourteenth Amendment *(West* v. *C. & P. Tel. Co.*, 295 U.S. 662; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226; *Martin* v. *Creasey*, 360 U.S. 219.

4. This is a suit against the State Road Commissioner for wrongfully exceeding his authority, under color of office, and for failing to perform a statutory duty. The contract being with the Road Commission it was a necessary party to a declaration of the rights thereunder. The mere declaration of such rights does not constitute a suit against the State. Once these rights are judicially determined, it will be shown that the Road Commissioner failed to perform his statutory duty. Under the prayer for coercive relief, as permitted in West Virginia declaratory judgment procedure to be joined with the prayer for declaratory relief, the complaint sequentially asks that the Road Commissioner be compelled to perform his statutory duty. In this respect the holding of the lower court is in conflict with the decisions of this Court in *Roleton* v. *Crittenden*, 120 U.S. 390,

Payne v. *Central P. R. Co.*, 255 U.S. 228, *Ickes* v. *Fox*, 300 U.S. 82, *Board of Liquidation* v. *McComb*, 92 U.S. 531, and *Noble* v. *Union River Logging Company*, 147 U.S. 165, and contrary in principle to *Sterling* v. *Constantin*, 287 U.S. 378.

5. *Mahone* v. *State Road Commission*, 99 W. Va. 397, 129 S.E. 320 decided in 1925 by the State Supreme Court, held that the statute authorizing the Road Commission to be sued was unconstitutional as violating the prohibition that the State should never be made a party defendant. In *Stewart* v. *State Road Commission*, 117 W. Va. 352, 185 S.E. 567 (1936), and other cases, the State Supreme Court further held that this immunity was absolute and could never be waived by the Legislature, nor could the State or any of its instrumentalities ever consent to be sued. Despite these decisions, when the statute was amended in 1957 the Legislature nevertheless did not delete the consent to be sued, but on its reenactment reaffirmed its position that the Road Commission could sue and be sued, and thereby provided a legislative recognition of the requirements of due process.

The trial Court took the position that by virtue of the decisions of the State Supreme Court, the action as a declaratory judgment proceeding was per se an action against the State. It undertook then to consider it as a mandamus and held that by virtue of the affidavits there existed "substantial controversy of fact" and that mandamus would not lie. The trial Court's ruling in this respect, without the taking of evidence on the merits so as to determine whether the proceeding was against the State or the Road Commissioner, is in conflict with this Court's decision in the cases of *Land* v. *Dollar*, 330 U.S. 731; *U.S.* v. *Lee*, 106 U.S. 196, and *Tindal* v. *Wesley*, 167 U.S. 204. Only after the preliminary question as to the rights of the parties had been decided, and the same decided against the Appellant can there come into play any claim of sovereign immunity.

6. The lower Court was of the opinion that the proceed-

ing was against the State in view of the fact that to compel the Road Commissioner to perform his statutory duties would set in motion a sequence of events which would ultimately result in the payment of money from the State Road Fund. This holding is contrary in principle to the decision of this Court in *Houston* v. *Ormes*, 252 U.S. 469.

The State Constitution by creating the State Road Fund separates and segregates the revenues from highway users to be expended solely for the construction and maintenance of highways, and expressly provides they will be used for "the *payment of obligations incurred in the construction*, reconstruction, repair and maintenance of *public highways.*" This is a special fund; it does not constitute a part of the general revenues; cannot be used for general purposes but only the purposes aforesaid; and the payments from which are not on debts of the State. (*State Road Commission* v. *O'Brien*, 140 W. Va. 114, 82 S.E. 2d 903). *The statutes expressly gives to the Road Commission the legislative authority to enter into highway construction contracts, and as part of that authority attached the condition it may be sued.* The statute also makes it mandatory for the Road Commissioner to audit the contractor's claims and issue his requisition for the payment of those found correct.

7. The Federal Government by furnishing participating funds for certain projects, the contracts for the construction of which are handled by the Road Commission, has utilized the Road Commission as its agent in the exercise of its constitutional functions in effecting its national highway policy. The construction of these contracts, their consequences, the rights and obligations of the parties, present a question of federal law within the principle enunciated by this Court in *U. S.* v. *Allegheny County*, 322 U.S. 174.

8. The State Supreme Court by its prior decisions holding the Legislature can never consent to a suit, imposed a stringency in excess of the common law doctrine of immunity. Under such holdings it is impossible to give con-

sent, although in fact the Legislature has consented to suits against the Road Commission. Whether such absolute immunity, in the light of the Legislature's granting such consent, is valid, regardless of whether the proceedings concern property taken for public use without compensation, is a question never passed on by this Court.

9. These federal questions are substantial to Appellant not only because of the extent of the property of which he has been deprived, but also because *the Road Commissioner's action has deprived him of the right to earn a livelihood in his chosen occupation.* Highway construction contracts are required to be bonded and *it is impossible for Appellant to secure the necessary bonds for any work as long as the Commissioner's action in abrogating his contract stands unresolved.*

10. On motion to dismiss, the allegations of Appellant's Complaint must be assumed to be true. The facts alleged are that the Road Commissioner, by refusing to certify Appellant's work has appropriated $1,338,511.67 of Appellant's property as incorporated in the public highway, without compensation to Appellant. *Appellant has been deprived of his property for public use, denied his compensation therefor, and refused the opportunity to establish his rights. Appellant has not had his day in Court, he has not had the due process of law.*

CONCLUSION

The questions presented on this appeal are of public importance, effecting both the State and Federal highway construction program, the highway construction industry and the broad spectrum of governmental morality. They involve the accountability of state officials and the delicate balance between the prerogative of governmental authority and the constitutional rights of the individual. Appellant submits that the precedents established by this Court do

not support the decision of the Circuit Court of Kanawha County but require its reversal, and that the questions presented are so substantial as to require plenary consideration with brief on the merits and oral argument, for their resolution.

May 13, 1965

Respectfully submitted,

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APPENDIX A

State of West Virginia

THIRTEENTH JUDICIAL CIRCUIT

Charleston

Frank L. Taylor
Judge

November 7, 1963

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Gentlemen:

Re Howard Price, etc. vs. The State Road Commission of West Virginia, etc., et al

This case, which now comes on upon the amended and supplemental motions of the defendants to dismiss the complaint of the plaintiff, was submitted upon briefs and oral argument.

The complaint of the plaintiff is lengthy. It alleges that a contract between the State Road Commission and the plaintiff for the construction of a portion of a highway known as Interstate 64, in Cabell County, West Virginia, was entered into on August 12, 1960. The contract, which is an exhibit to the complaint, is lengthy in and of itself, and includes by reference the "Standard Specifications For Roads And Bridges" of the State Road Commission of West Virginia, adopted in 1952. It provides, in essence, that the plaintiff would, in two hundred fifty working days, complete what may be referred to as the excavation, grading and filling necessary for paving the section of road referred to therein. According to the allegations of the complaint the contract "was entered into upon the basis of unit prices for estimated or planned quantities * * * of items of work and material, as estimated and planned by the Road Commission, * * *." It is further alleged that the total *estimated* contract price is based on estimated quantities and was in the amount of $1,352,235.48. The complaint further alleges that "the total estimated contract (was) subject to being adjusted on the basis of the agreed unit prices for the quantities actually required."

The complaint is replete with allegations which indicate the exercise of discretion by the defendants, and alleges that the project will require more work than was originally contemplated. The complaint and the exhibits filed therewith indicate that there were items of disagreement between the plaintiff and the defendants, and the allegation is made that

the Road Commission has declared the contract in default. It is further alleged that following this action there was a conference between the Road Commissioner and the plaintiff but that as a result of the conference no amendment of the default order was made and the job was shut down by the defendants. It is further alleged that the project was evaluated by a firm of consulting engineers, and thereafter the balance of the work to be performed was put out to bid and the low bid received for the completion thereof was in the amount of $1,037,855.02.

The complaint further alleges that the Road Commission, the Road Commissioner and the Construction Director of the Road Commission are without authority to declare the default, and without authority to withhold from the plaintiff the sum of money first mentioned, it being claimed by the plaintiff that this is the value of the work which he has done.

The complaint prays for a declaratory judgment declaring that the contract is not in default, that the plaintiff has the right to proceed with the performance of the contract, and that the Road Commissioner be required to certify the performance of the quantities of work which are complete and unpaid. The complaint also prays for coercive relief in addition to the declaratory relief in the following particulars:

1. That the defendants be compelled to cancel and set aside any and all records which may show the contract in default;

2. That the defendants be compelled to perform their duty and certify to the State Auditor the amount of work already performed by the plaintiff and the amount due therefor;

3. That the defendants be compelled to return a project engineer to the job in order that the plaintiff may proceed

with the work and that the defendants be restrained from interfering with the plaintiff in his return to work; and

4. That the defendants be enjoined from letting any other or further contract for the balance of the work to be performed on the project.

It will thus be seen that the complaint prays for various judgments of this Court upon matters which involve discretion upon the part of the defendants, as well as relief relating to the statutory requirement (Code, 17-3-4) that claims of contractors "shall be audited by the commissioner and, if found correct, the commissioner shall issue the commission's requisition upon the auditor of this state therefor * * *."

The defendants have filed their amended and supplemental motions to dismiss, which motions raise three issues:

1. That the individual defendants comprising the State Road Commission of West Virginia have no authority or jurisdiction perforce Code, 17-3-4, as amended by the Acts of the 1963 Legislature, with reference to construction contracts or contractor's claims, or to the issuance of requisitions upon the State Auditor.

2. That the State Road Commission, the State Road Commissioner, the members of the State Road Commission, and the Director of the Construction Division, are all public officials or employees, and acting within the scope of their authority in the exercise of a governmental function with the conclusion drawn that the present action is an action against the State of West Virginia and within the inhibition of Article VI, Section 35, of the Constitution of West Virginia.

This ground of the motion also raises the subsidiary issues that this action is in effect an action to recover money from the State Road Commission; that the acts complained of by the plaintiff involve the exercise of discretion by the

defendants; and that the plaintiff has not exhausted his statutory remedies established for the prosecution of claims against the State by proceeding through the office of the Attorney General and the State Legislature.

3. That the complaint "fails to state a cause of action for which relief can be granted."

This motion was filed pursuant to R.C.P. 12(b); (1) and (6). In *Lugar and Silverstein, West Virginia Rules*, the following language is found at page 101:

> "In general a motion under Rule 12(b)(6) to dismiss the complaint, 'for failure to state a claim upon which relief can be granted,' corresponds to the demurrer under the old practice, * * *."

See also *1A Barron and Holtzoff, Federal Practice and Procedure*, §356. At page 355 of that text the following language is to be found:

> "The motion performs essentially the same function as the former demurrer in actions at law, and the motion to dismiss for want of equity in suits in equity, but is not limited by the technical requirements which attached to those ancient and now outmoded devices."

At page 369, the same volume, this language is to be found:

> "The motion should be determined upon allegations of the complaint and undisputed facts as they appear from pleadings, orders, and records of the case."

In this connection I call attention to the language of the motion in paragraph B-3 thereof, viz: "in reference to and behind the matters alleged by the plaintiff, all of which for the purposes of this motion alone *defendants do hereby deny*, * * *." (Emphasis supplied.)

It is obvious that upon such a motion as this the defendants cannot traverse the complaint. However, I shall treat the quoted language as surplusage and attempt to test the complaint by its allegations.

Counsel for the plaintiff argue that the inhibition of Article VI, Section 35, of the Constitution is not an absolute but, to the contrary, must be considered in the light of due process provisions of federal and state constitutions. It is true that the West Virginia Court has by its opinions broadened the scope of declaratory relief to the extent that now actions against public officials are entertained with more liberality than was formerly the rule. However, counsel for the plaintiff rely heavily upon *Douglass* v. *Koontz*, 137 W.Va. 345, and make the statement in their brief that this case is controlling of the issues arising in the case at bar. *Douglass* v. *Koontz* was a declaratory judgment suit brought against the State Tax Commissioner to determine whether or not the Business and Occupation tax imposed by Chapter 11, Article 13 of the Code was applicable to a given state of facts, and it was held therein that such an action was not a suit against the State within the inhibition of the West Virginia Constitution. The following broad language is to be found at page 351 of the opinion:

> "The question whether this proceeding comes within the inhibitory provisions of West Virginia Constitution, Article VI, Section 35, is narrow, and may be tersely stated as follows: Can a declaratory judgment suit be maintained against the state tax commissioner, where, as in the instant proceeding, the petition does not seek to obtain money or other property belonging to the State, *or to control the discretion of an official* or to compel the State, or an official thereof, to execute a contract on behalf of the State, but simply alleges that the statute does not apply to the taxpayer and asks for a declaratory judgment bearing directly and solely on that issue." (Emphasis supplied.)

Tested by the rule laid down by that case, I can only reach the conclusion that the allegations of the complaint coupled with the several prayers therein, state a cause of action which in large measure would seek to have this Court control the discretion of the defendants. This conclusion ap-

plies to paragraphs numbered 1 and 2 in the prayer for declaratory relief, and the paragraphs numbered 1, 3 and 4 in the prayer for coercive relief. To the extent defined here, the motion to dismiss will be sustained.

In the case of *Draper* v. *Anderson*, 102 W.Va. 633, the syllabi are as follows:

> "The performance by public officials of a plain statutory duty, not involving the exercise of discretion or judgment on their part, may be enforced by the writ of mandamus."
>
> "Under Section 28, Chapter 43, Code, providing that any claim of contractors for labor done or material furnished to the State Road Commission pursuant to the provisions of the act shall be audited by the Commission, and if found to be correct, the Commission shall issue its requisition upon the auditor therefor, the Road Commission may be compelled by mandamus, at the instance of contractors in cases not involving a substantial controversy of fact, to issue a requisition upon the auditor for labor performed by them in the construction of a State road under a contract with the State, by the Road Commission."

Based upon this authority, I am of opinion at this time to overrule the motion to dismiss in so far as it relates to paragraph 3 of the prayer for declaratory relief, to paragraph 2 of the prayer for coercive relief, and to the allegations supporting these prayers. If there be no substantial issue of fact with reference to the amount of work done by the plaintiff prior to the time the defendants closed down the job and declared the contract in default, then the auditing of the work which he has done and the payment therefor requires no exercise of discretion on the part of the Road Commissioner, and such relief may be granted in this action. Of course a final determination of this issue will depend upon the issues of fact which may be raised by a responsive pleading to the complaint.

A proper order in conformity herewith should be ten-

dered for entry promptly. The defendants will then be allowed ten days in which to answer those portions of the complaint which relate to the performance of the non-discretionary acts on the part of the defendants. The order to be tendered should make this letter memorandum of opinion a part of the record, and a copy for that purpose may be obtained from my secretary.

Very truly yours,

FRANK L. TAYLOR, *Judge*

FLT:R

APPENDIX B

State of West Virginia.

THIRTEENTH JUDICIAL CIRCUIT

Charleston

April 13, 1964

Frank L. Taylor
Judge

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Gentlemen:

Re Howard Price, d.b.a. Howard Price & Company vs.
The State Road Commission of West Virginia, et al

This cause now comes on upon the defendants' motion for summary judgment and motion to dismiss the complaint for lack of jurisdiction, accompanied by the supporting affidavits of R. D. Bryant, Assistant Director of Construction

of the West Virginia State Road Commission, and Wilson W. Ward, Director of the Construction Division of the State Road Commission, and the opposing affidavit of the plaintiff, Howard Price; upon the plaintiff's motion to strike that portion of the defendants' answer designated "Answer Denying Jurisdiction"; and upon the defendants' motion to strike the plaintiff's counterclaim to the defendants' counterclaim, motion to dismiss the plaintiff's counterclaim for lack of jurisdiction, and for summary judgment on the plaintiff's counterclaim.

Counsel for the plaintiff contend that the affidavits submitted by the defendants may not be considered by this Court in the determination of the defendants' motion to dismiss the complaint for lack of jurisdiction. *Holnberg v. Williamson*, 135 F. Sup. 493, is cited for the proposition that consideration of a motion to dismiss must be confined to the pleadings. This rule, however, applies only to a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6). *Doherty v. Federal Stevedoring Co.*, 198 F. Sup. 191 (D.C.N.Y. 1961). It is stated in *2 Moore's Federal Practice*, 2nd Ed., §12.09, page 2256, that there has never been any substantial doubt as to the availability of a speaking motion to present defenses under Rule 12(b)(1)-(5). To the same effect is *1A Federal Practice and Procedure, Barron & Holtzoff*, §352, page 340:

> "Affidavits may be considered on a motion to dismiss for want of jurisdiction; on such a motion, unlike a motion to dismiss for failure to state a claim or a motion for summary judgment, the court may weigh the affidavits and other evidence to determine the existence or nonexistence of the requisite facts. Questions of jurisdiction over the subject matter are addressed to the court and are not triable by a jury."

Two illustrative Federal decisions employing this rule are *Nash-Kelvinator Corporation v. California Ref rigerator Repair Shop*, 11 F.R.D. 313 (D.C.Cal. 1950), holding that the

court may consider affidavits on a motion to dismiss an action for lack of jurisdiction without treating the motion as one for summary judgment, and *Williams* v. *Minnesota Mining & Manufacturing Co.*, 14 F.R.D. 1, (D.C. Cal. 1953), holding that the court may determine the jurisdictional facts from the affidavits and pleadings, grant the motion to dismiss on the basis of the facts so found, and at the same time, deny a motion for summary judgment because of a genuine issue as to a material fact. Therefore, since Rule 12(b), W.Va. R.C.P. is identical to Federal Rule 12(b), which is construed to permit speaking motions in determining jurisdiction, I am of opinion that the affidavits in this case may properly be considered in passing on defendants' motion to dismiss for lack of jurisdiction.

Without commenting on the propriety of instituting this action pursuant to the West Virginia Declaratory Judgment Act, governed by the new Rules of Civil Procedure, rather than by petition for writ of mandamus, excluded from the operation of the new rules, it must be recognized that the substantive right of a private individual or corporation to compel performance of a purely ministerial act by a public official under Code, 17-3-1 cannot be enlarged by the form or theory of the pleading instituting the action or proceeding. Therefore, the limitations of asserting a claim under Code, 17-3-1, heretofore prescribed and applied by the Supreme Court of Appeals of this State in mandamus proceedings, will be regarded as authority for a determination of the plaintiff's right in this case.

Objection is made to the defendants' motion to dismiss and motion for summary judgment on the ground that they are repetitions of defendants' previous motion to dismiss. It is the plaintiff's contention that the reassertion of the motion to dismiss and the motion for summary judgment, accompanied by the affidavits in support thereof, are prohibited by Rule 12(g), R.C.P. I do not so construe Rule 12(g). The rule speaks of waiver in situations where the

"defense" or "objections" are omitted, rather than the form or manner in which the objection is made. In this case the defense of lack of jurisdiction was properly raised in the former motion to dismiss. The rules do not prevent subsequent filing of motions to dismiss and for summary judgment where such motions are not interposed merely for delay purposes.

It is also argued by counsel for the plaintiff that the question of jurisdiction is moot because the assertion of the defendants' counter-claim constitutes a waiver of immunity. Counsel relies upon *State* v. *Ruthbell Coal Co.*, 133 W.Va. 319, and *Road Commission* v. *Ball*, 138 W.Va. 349, as authority for the proposition that the assertion of a counterclaim by the State Road Commission constitutes a waiver of the constitutional immunity from suit and exposes the defendants to liability for any cause arising out of the construction contract. *Road Commission* v. *Ball*, *supra*, is not, as I construe it, authority for the proposition that an unliquidated counterclaim may be asserted against the State Road Commission. Although the first Syllabus point states that a defendant, in a tort action instituted by The State Road Commission, cannot recover "* * * unliquidated damages in *excess* of the amount charged in the plaintiff's declaration." (Emphasis supplied), which might possibly be construed as opening the door to counterclaims not in excess of the amount charged by the plaintiff, the text of the opinion rejected the unliquidated counterclaim on the waiver theory, stating that the counterclaim in tort constitutes a suit against the State, prohibited by Section 35, Article VI, West Virginia Constitution. It is also pointed out in that decision that in the *Ruthbell Coal Company* case, the counterclaim was liquidated, grew out of the transaction giving rise to the plaintiff's claim, that no affirmative relief was sought by defendant, and that the State had no direct or monetary interest in the fund involved. In view of the disparity of situations between the *Ruthbell* case and the case at bar, I am of opinion that the counterclaim asserted

by the State Road Commission does not constitute a waiver of its constitutional immunity.

The most perplexing issue involved in this case is the constitutional immunity question, raised by defendants' motion to dismiss for lack of jurisdiction, such motion being supported by the affidavits of R. D. Bryant and Wilson W. Ward, and opposed by the affidavit of the defendant Howard Price. It is the contention of the defendants that the plaintiff's claim involves numerous controversies, disputes of fact, differences of interpretation and opinion between the parties, and involves the exercise of discretion by the defendants, and may not, therefore, be enforced by coercive relief.

In ruling on the defendants' previous motion to dismiss plaintiff's complaint, by letter memorandum of opinion dated November 7, 1963, I overruled the motions as to the third paragraph of the prayer for declaratory relief, and the second paragraph of the prayer for coercive relief, primarily upon the authority of *Draper* v. *Anderson*, 102 W.Va. 633, construing Code, 17-3-4, stating in the two syllabi:

> "The performance by public officials of a plain statutory duty, not involving the exercise of discretion or judgment on their part, may be enforced by the writ of mandamus."
>
> "Under Section 28, Chapter 43, Code, providing that any claim of contractors for labor done or material furnished to the State Road Commission pursuant to the provisions of the act shall be audited by the Commission, and if found to be correct, the Commission shall issue its requisition upon the auditor therefor, the Road Commission may be compelled by mandamus, at the instance of contractors in cases not involving a substantial controversy of fact, to issue a requisition upon the Auditor for labor performed by them in the construction of a state road under a contract with the State, by the Road Commission."

However, the introduction of the affidavits requires a re-

examination of this Court's authority to assume jurisdiction of this case. Without resorting to a protracted comparison of each and every claim of plaintiff with the statements in defendants' affidavits concerning those claims, it would appear to be a fair statement of the undisputed facts to say that the entire claim of the plaintiff, and each item thereof, involves some substantial dispute, either as to the quantity or quality of the work done, or to the plaintiff's right to compensation for the work performed under the terms of the contract, or both. It should be noted at this point that paragraph six of the reply affidavit does not effectively contradict any of the statements in the defendants' affidavits since that sentence is merely a conclusion containing no specific averments of fact. The factual situation in *Draper* v. *Anderson*, *supra*, appears to be significantly different from the facts demonstrated by the affidavits in this case. In the *Draper* case, where the work was completed by the petitioner and accepted by the State Road Commission as fully complying with the terms of the contract, the concluding paragraph of the opinion states:

> "As the record does not in our opinion present any substantial issue of fact, and the position of the respondents not being justified as a matter of law under the terms of the contract, the peremptory writ will be awarded."

In *State* v. *Road Commission*, 108 W.Va. 41, in refusing a writ of mandamus to compel the State Road Commission to execute a requisition upon the State Auditor for work performed in the construction of a roadway, Judge Maxwell, in the majority opinion, makes the following observations of the *Draper* decision:

> "Our case of *Draper* v. *Anderson, et al*, 102 W.Va. 633, relied on by relators, does not sustain the position of relators in this particular. It is there held 'that * * * the Road Commission may be compelled by mandamus, at the instance of the contractors in cases not involving a substantial controversy of fact, to issue a requisition

upon the auditor for labor performed by them in the construction of a state road under a contract with the State, by the Road Commission.' Clearly, the 'labor performed by them * * * under a contract' there referred to, is labor for which the contractors are to be paid under the terms of the contract,—not labor as to which there may be a legal question as to whether the contract contemplates compensation to the contractors. The *Draper* case only went to the extent of holding, as declared in syllabus one, that 'The performance by public officials of a plain legal duty, not involving the exercise of discretion or judgment on their part, may be enforced by writ of mandamus.' The converse is necessarily true. Where there is not a plain statutory duty to be performed mandamus will not lie. * * *."

There are numerous decisions by our Supreme Court of Appeals uniformly holding that before mandamus will lie to control the official acts of an individual or commission created by the State, the petitioner must show a clear legal right to the relief sought. *State ex rel. Dunn* v. *Griffith*, 139 W.Va. 594; *Childers* v. *State Road Commissioner*, 124 W. Va. 250; *State ex rel. Conley* v. *Pennybacker*, 131 W.Va. 442; and *State ex rel. Fox* v. *Board of Trustees*, The Syllabus Service, Supreme Court of Appeals of West Virginia, March 17, 1964. And where discretion is involved in the doing of an act or the refusal to act, the exercise of such discretion may not be controlled by mandamus. *Heavner* v. *State Road Commission*, 118 W.Va. 630; and *Reynolds* v. *State Road Commission*, 111 W. Va. 398.

While the requirement of clear legal right may seem harsh when applied to certain isolated situations, the necessity of the rule lies in the recognition of the very basic principle that the legislative, executive and judicial departments of the government must be kept separate and distinct, and each in its legitimate sphere must be protected. *Article V, Section 1, Constitution of West Virginia*; and *State ex rel. Brotherton* v. *Blankenship*, 83 W.Va. 302. In the very recent decision in *Cunningham* v. *County Court of Wood County*, 134

S.E. 2d 725 (W.Va. 1964), Judge Calhoun made the following observations:

> "Section 21 of Article VIII of the Constitution provides that the common law shall continue in force in this state 'until altered or repealed by the Legislature.' Similar language has been a part of the statutes of this state throughout the years of its existence. Code, 1931, 2-1-1. This Court, therefore, is sternly and unmistakenly enjoined to leave drastic changes in the common law to the legislative branch of the state government. Currently it is widely debated that the rule of governmental immunity should be abolished. We firmly believe, however, that this Court should not undertake, by judicial pronouncement to abrogate a legal principle which has through a long period of years been so basic in the laws of this state."

In view of the fact that the ultimate relief sought by plaintiff is the payment of money out of the treasury of the State Road Fund for claims uncontrovertedly shown to involve substantial controversies of facts by the affidavits, I am of opinion to sustain the defendants' motion to dismiss the complaint for lack of jurisdiction.

Finally, the counterclaim of the defendants, being asserted only under the protest that this Court has no jurisdiction of the plaintiff's claim, will be dismissed without prejudice.

A proper order in conformity herewith should be tendered for entry promptly, making this letter memorandum of opinion a part of the record. A copy for that purpose may be obtained from my secretary.

Very truly yours,

FRANK L. TAYLOR, *Judge*

FLT:R

APPENDIX C

Chapter 26, Acts of the West Virginia Legislature, Regular Session, 1941, p. 152, entitled "Uniform Declaratory Judgments Act", being Chapter 55, Article 13 of the Code of West Virginia, 1931, as Amended; Same, Michie's Code of 1961 (Serial Sections 5816(1) to (16)) p. 1151)

Section 1. POWERS OF COURTS TO DECLARE RIGHTS, STATUS AND OTHER LEGAL RELATIONS.—Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Section 2. WHO MAY HAVE DETERMINATION AND OBTAIN DECLARATION.—Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Section 3. CONSTRUCTION OF CONTRACT BEFORE OR AFTER BREACH.—A contract may be construed either before or after there has been a breach thereof.

Section 4. DECLARATION CONCERNING TRUSTS AND ESTATES.

. . .

Section 5. ENUMERATION NOT RESTRICTION.—The enumeration in sections two, three, and four does not limit or restrict the exercise of the general powers conferred in section one in any proceeding where declaratory

relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

Section 6. WHEN COURT MAY REFUSE JUDGMENT OR DECREE. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

Section 7. REVIEW OF ORDERS, JUDGMENTS AND DECREES.—All orders, judgments and decrees under this article may be reviewed as other orders, judgments and decrees.

Section 8. FURTHER RELIEF ON PETITION; SHOWING BY ADVERSE PARTY.—*Further relief based on a declatory judgment or decree may be granted whenever necessary or proper.* The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith (Italics supplied).

Section 9. ISSUES OF FACT; TRIAL AND DETERMINATION.—*When a proceeding under this article involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.* (Italics supplied).

Section 10. AWARD OF COSTS.

* * *

Section 11. PARTIES TO ACTION; MUNICIPAL ORDINANCE OR FRANCHISE INVOLVED.

* * *

Section 12. ARTICLE REMEDIAL; LIBERAL CONSTRUCTION AND ADMINISTRATION. This article is

declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

Section 13. "PERSON" DEFINED.

* * *

Section 14. PROVISIONS SEVERABLE; EXCEPTIONS.

* * *

Section 15. INTERPRETATION AND CONSTRUCTION.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

Section 16. CITATION OF ARTICLE.—This article may be cited as the "Uniform Declaratory Judgments Act."

APPENDIX D

WEST VIRGINIA RULES OF CIVIL PROCEDURE FOR TRIAL COURTS OF RECORD

Adopted and promulgated by order of the Supreme Court of Appeals of West Virginia entered October 13, 1959, effective on and after July 1, 1960, and as contained in 144 W. Va. Reports, p. xcviii.

* * *

RULE 57

DECLARATORY JUDGMENTS

The procedure for obtaining a declaratory judgment pursuant to the West Virginia Uniform Declaratory Judgment Act, Code, Chapter 55, Article 13, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. *The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. A party may demand declaratory relief or coercive relief or both in one action. Further relief based on a declaratory judgment may be granted in the declaratory action* or upon petition to any court in which the declaratory action might have been instituted. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. (Italics supplied).

* * *

APPENDIX E

HOWARD PRICE d/b/a
HOWARD PRICE & CO.

vs. Civil Action No. 3479

THE STATE ROAD COMMISSION
OF WEST VIRGINIA, et al.

On days heretofore this cause came on to be heard on:

a. Defendants' motion for extension of time to answer;

b. Defendants' motion to dismiss the complaint for lack of jurisdiction and motion for summary judgment for lack of jurisdiction, each accompanied by supporting affidavits;

c. Defendants' answer, answer denying jurisdiction, and counterclaim;

d. Plaintiff's opposition in open court to defendants' motion for extension of time, and motion in open court to strike defendants' motions to dismiss for lack of jurisdiction and for summary judgment;

e. Plaintiff's reply affidavit in opposition to defendants affidavits;

f. Plaintiff's reply to defendants' answer, motion to strike defendants' answer denying jurisdiction, and counterclaim to defendants' counterclaim; and

g. Defendants' motion to dismiss for lack of jurisdiction and for summary judgment addressed to plaintiff's counterclaim to defendants' counterclaim;

and upon all of the previous pleadings, motions and papers filed herein and upon the briefs and arguments of counsel.

Whereupon the Court took time to consider its decision and after mature deliberation and collective consideration of the above pending motions and pleadings, is of opinion

to, and doth hereby, SUSTAIN the defendants' motion to dismiss the complaint filed herein for lack of jurisdiction, for the reasons expressed in a letter memorandum of opinion of the Court dated April 13, 1964, which letter memorandum of opinion is ORDERED to be, and is hereby, filed herein as a part of this order and made a part of the record of this cause.

It is accordingly ADJUDGED, ORDERED and DECREED that:

1. Plaintiff's complaint be, and it is hereby, dismissed;

2. Defendant's counterclaim, having been asserted only under protest that this Court has no jurisdiction of plaintiff's action, be and it is hereby, dismissed without prejudice; and plaintiff's counterclaim to defendants' counterclaim be, and it is hereby, dismissed without prejudice;

3. Defendants be, and they are hereby, awarded judgment against the plaintiff for their costs in their own behalf expended and a statutory fee of ten dollars.

To all of which action of the Court the plaintiff does object and except for the following reasons:

1. The Court's ruling denies plaintiff the rights guaranteed to him under Sections 9, 10 and 17, Article III of the Constitution of West Virginia.

2. *The Court's ruling denies plaintiff the rights guaranteed to him* under Section 10, Article I of the Constitution of the United States, and *under Section 1, Article XIV of the Amendments to the Constitution of the United States.* (Italics supplied)

3. The construction of a public road under contract to a private person is not a governmental function within the prohibition of Section 35, Article VI of the Constitution of West Virginia.

4. *Plaintiff's action* is not a suit against the State of

West Virginia within the prohibition of Section 35, Article VI of the Constitution of West Virginia, but is *an action to declare plaintiff's rights and compel the performance of a statutory duty by the defendant Burl A. Sawyers as State Road Commissioner.* (Italics supplied)

5. *The controversy of fact appearing on the pleadings does not establish a lack of jurisdiction under Section 35, Article VI of the Constitution of West Virginia.* (Italics supplied)

6. *The Court has jurisdiction to hear evidence to determine its jurisdiction, and on defendants' allegation that the action was a suit against the State and there is a dispute of fact, such jurisdiction can be determined only by evidence taken.* (Italics supplied)

7. On a dispute of fact appearing on the pleadings under a defense of the State's immunity, plaintiff was entitled to have evidence taken to establish his right by clear and convincing proof.

8. For such other reasons as may be later assigned by plaintiff.

ENTER:

FRANK L. TAYLOR
Judge

May 19, 1964
Inspected by:
LEE M. KENNA
Counsel for Defendants

CARNEY M. LAYNE
CHARLES W. YEAGER
Counsel for Plaintiff

APPENDIX F

Pertinent State Constitutional Provision

Constitution of West Virginia, 1872, as Amended by House Joint Resolution 6, Acts of the 45th Legislature of West Virginia, Regular Session 1941, p. 589; Chapter 11, same volume, p. 89, submitted to voters; Ratified November, 1942, adding the following new section:

ARTICLE VI

* * *

REVENUES APPLICABLE TO ROADS

§52. Revenue from gasoline and other motor fuel excise and license taxation, motor vehicle registration and license taxes, and all other revenue derived from motor vehicles or motor fuels shall, after deductions of statutory refunds and cost of administration and collection authorized by legislative appropriation, be appropriated and *used solely for construction*, reconstruction, repair and maintenance of *public highways*, and also the payment of the interest and principal on all road bonds heretofore issued or which may be hereafter issued for the construction, reconstruction or improvement of public highways, *and the payment of obligations incurred in the construction*, reconstruction, repair and maintenance *of public highways*. (Italics supplied)

APPENDIX C

PERTINENT STATE STATUTES

Chapter 17 of the Code of West Virginia, 1931, as amended by the Acts of the Legislature of West Virginia as indicated after the sections. (Note: Last official code of West Virginia published in 1931. Only official source of amendments thereto is in Legislative Acts. Michie's West Virginia Code of 1961 (unofficial) and the 1964 Supplement thereto conveniently compiles all sections and amendments thereto b ythe official code section, article and chapter designation).

ARTICLE 3. STATE ROAD FUND

Section 1. *There shall be a state road fund, which shall* consist of the proceeds of . . . When any money is collected from any of the sources aforesaid, it shall be paid into the state treasurer by the officer whose duty it is to collect and account for the same, and *credited to the state road fund, and shall be used only for the purposes named in this chapter, that is to say;* (a) To pay the principal and interest due on all state bonds issued for the benefit of said fund, and set aside and appropriated for that purpose; (b) to pay the expenses of the administration of the road department; (c) *to pay the cost of* maintenance, *construction,* reconstruction and improvement *of all primary roads;* (d) *to pay the cost of* maintenance, *construction,* reconstruction and improvement *of all secondary roads.* * * * (Chapter 3, Acts of the Legislature of West Virginia, 2d Extraordinary Session, 1933, p. 7; Chap. 17, Art. 3, Sec. 1 of Michie's West Virginia Code of 1961, (Serial Section 1449(1)), p. 873). (Italics supplied)

§2. COST OF CONSTRUCTION, RECONSTRUCTION, IMPROVEMENT AND MAINTENANCE OF STATE ROADS.—*The cost* and expense *of the construction,* reconstruction, improvement or maintenance *of all state roads shall be paid out of any moneys received by* or appropriated to *the state road commission for that purpose* (Chapter 17, Article 3, Section 2,

Official Code of West Virginia, 1931, p. 390; Same, Michie's Code of West Virginia 1961, (Serial Section 1450), p. 874.) (Italics supplied).

* * *

Section 4. METHOD OF DISBURSING ROAD FUND.—*Any claim of a contractor* or others, not otherwise provided for, *for labor done or for materials, services or supplies furnished to the state road commission,* pursuant to the provisions of any article of this chapter, *shall be audited by the commissioner, and, if found to be correct, the commissioner shall issue the commission's requisition upon the auditor of the State therefor,* showing the nature of such claim and whether it is for labor done or materials, services or supplies furnished for construction of state roads, or for other purposes, and the auditor shall issue his warrant upon the state treasurer therefor, and the treasurer shall pay the same to the person, firm or corporation entitled thereto, out of the funds in the treasury provided for that purpose. (Chapter 160, Acts of the Legislature of West Virginia, Regular Session 1963, p. 772; Chap. 17, Art. 3, Sec. 4 of Michie's Code of West Virginia 1961, 1964 Cumulative Supplement, (Serial Section 1452), p. 171.) (Italics supplied).

ARTICLE 4. STATE ROAD SYSTEM; PRIMARY AND SECONDARY ROADS.

Section 19. CONTRACTS FOR WORK AND MATERIALS; ADVERTISING AND BIDS; SERVICES BY STATE ROAD FORCES AND PRISON LABOR. —*All work of construction* * * * *of state roads* * * *, *and the furnishing of all materials and supplies therefor* * * * *shall be done and furnished pursuant to contract* * * * (Chapter 143, Acts of the Legislature, Regular Session, 1957, p. 687; Chap. 17, Art. 4, Sec. 19 of Michie's West Virginia Code of 1961 (Serial Section 1474 (1) (p. 880). (Italics Supplied).

Section 20. EXECUTION OF CONTRACT AND BOND BY SUCCESSFUL BIDDER; COPY FURNISHED CLERK OF COUNTY COURT; FORFEITURE OR RETURN OF CHECKS OR BONDS.— * * * (Chapter 3, Acts of the West Virginia Legislature,

Regular Session 1943, p. 78; Chap. 17, Art. 4, Sec. 20 of Michie's West Virginia Code of 1961 (Serial Section 1474(2) p. 881).

Section 21. FORM OF CONTRACT; SIGNING.— • • • (Chapter 40, Acts of the West Virginia Legislature, First Extraordinary Session 1933, p. 280; Chap. 17, Art. 4, Sec. 21 of Michie's Code of West Virginia, 1961 (Serial Section 1474(3) p. 882).

APPENDIX H

ORDER CERTIFYING EXISTENCE OF FEDERAL QUESTIONS

On motion of the Plaintiff, Howard Price, d/b/a Howard Price and Company, this Court, in addition to the orders made herein, orders it to be and it hereby is certified and by this order made a part of the record in this case, and of the final order of dismissal heretofore entered herein, that under the West Virginia Rules of Civil Procedure, no responsive pleading is permitted to a motion to dismiss; that in the arguments, made in this Court on behalf of the Plaintiff, upon Defendants' motions to dismiss, it was insisted and relied upon by said Plaintiff, that the application of Section 35, Article VI of the Constitution of West Virginia, to this case would deprive Plaintiff of his property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Federal Constitution; and it became material and necessary to the determination of this case by this Court to determine this question so raised by the Plaintiff, and that this Court found that such Constitutional rights of Plaintiff would not be violated by sustaining Defendants' motion to dismiss, and the questions were determined adversely to said Plaintiff as appears from the entry of the final order of dismissal made herein.

This Court further orders it to be, and it is hereby certified and by this order made a part of the record in this case, that the petition to the Supreme Court of Appeals of West Virginia, from the final order of this Court, having been refused, that this is the highest Court in the State of West Virginia in which a decision could be had.

All of which is accordingly ADJUDGED and ORDERED,

and the Clerk directed to enter the within order and certificate in the Order Book of this Court.

ENTER:

FRANK L. TAYLOR
Judge of the Circuit Court
of Kanawha County, West Virginia

PRESENTED BY:
CHARLES W. YEAGER
of Counsel for Plaintiff

APPROVED:
BENJAMIN A. RITCHIE
of Counsel for S. R. C. et al

APPENDIX I

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

HOWARD PRICE dba
HOWARD PRICE and COMPANY,
Plaintiff,

vs.

For Declaratory Judgment
and Coercive Relief
Civil Action 3479

THE STATE ROAD COMMISSION OF WEST VIRGINIA, a corporation; BURL A. SAWYERS, as STATE ROAD COMMISSIONER; WILSON H. WARD, as DIRECTOR OF THE CONSTRUCTION DIVISION, State Road Commission of West Virginia; and CHARLES M. HARRISON, LOUIS E. PETITTO, WILBUR S. JONES, HAL M. SCOTT, RALPH S. SHEPLER, W. H. HANKS, and JOHN E. FAULCONER, as Members of and Constituting the State Road Commission of West Virginia,
Defendants.

COMPLAINT

This action is brought pursuant to the West Virginia Uniform Declaratory Judgment Act, Chapter 55, Article 13, Code of West Virginia, 1931, as amended, and in accordance with Rule 57 of the Rules of Covil Procedure, and the subdividing titles being placed for convenience of reference only, the plaintiff, Howard Price dba Howard Price and Company, says as follows:

THE DEFENDANTS

I

That the defendant The State Road Commission of West Virginia, hereafter referred to as "Road Commission", is a statutory corporation created and existing under and by virtue of Chapter 17, Article 2, of the Code of West Virginia, 1931, as amended; that the office of State Road Com-

missioner was created and exists under and by virtue of Chapter 17, Article 2A of the Code aforesaid; that the defendant Burl A. Sawyers, as State Road Commissioner of West Virginia, hereafter referred to as "Road Commissioner", has been duly appointed and is presently acting as such; that the defendant Wilson H. Ward, Director of the Construction Division of the State Road Commission, hereafter referred to as "Construction Director", has been duly appointed and is presently acting as such; that the office of Member of the State Road Commission of West Virginia is created and existing under and by virtue of Chapter 17, Article 2 of the Code aforesaid, and that Charles M. Harrison, Louis E. Petitto, Wilbur S. Jones, Hal M. Scott, Ralph S. Shepler, W. H. Hanks, and John E. Faulconer, hereafter referred to as "Commission Members", have been duly appointed and are presently acting as such; that by virtue of Chapter 17 of the Code aforesaid, the Road Commission and Road Commissioner are authorized to construct public roads and enter into contracts therefor; that it is the duty of the Construction Director and Road Commissioner to certify to the Commission the performance of work done under contract and the amounts due thereunder; and by virtue of Chapter 17, Article 3, Section 4, of said Code, it is the duty of the Commission and Commission Members to audit the claims of contractors and for those found correct to issue requisitions upon the State Auditor for payment thereof.

THE CONTRACT

II

That the Road Commission, acting through Patrick C. Graney, the then Road Commissioner for the State of West Virginia, did after bid award, enter into a contract, hereafter referred to as "contract", with the plaintiff, Howard Price dba Howard Price and Company, for the grading and draining of a certain portion of the roadway known as Interstate Highway 64, located in Cabell County, West Vir-

ginia, and more particularly designated as Project Number I-64-1 (37) 22, Cabell County, hereafter referred to as "project", and which said contract is dated August 12, 1960; that the contract documents consist of (1) the contract instrument, (2) the contractor's proposal, (3) the Standard Specifications, Roads and Bridges, Of the State Road Commission of West Virginia, Adopted 1952, (4) the Special Provisions to said contract and amendments and revisions to said Standard Specifications, (5) the contract bond, and (6) the drawings and plans for said project, a copy of each of which, except the drawings and plans, is attached hereto and made a part hereof; Item 3, the Standard Specifications in book form being marked Exhibit 1, and Items 1, 2, 4 and 5 being in a single booklet and collectively marked Exhibit 2; that the plans and drawings are by reference made a part hereof, and will be tendered as Exhibit 3 upon the request of the Court or any party defendant hereto. That as required by statute and the contract, Plaintiff executed a bond for the faithful performance of said work with the United States Fidelity and Guaranty Company, a corporation, as Surety, hereafter called "Surety", and as a customary condition to obtaining said suretyship, Plaintiff executed the customary indemnification agreement with the Surety to the effect Plaintiff would save Surety from any loss.

III

That said contract was by bid, and was entered into upon the basis of unit prices for estimated or planned quantities, hereafter referred to as "estimated quantities," of items of work and material, as estimated and planned by the Road Commission, and the total estimated contract price, based on estimated quantities, was $1,352,235.48; that said estimated quantities are subject to the requirements of the project, being either more or less than estimated or planned, and the total estimated contract subject to being adjusted on the basis of the agreed unit prices for the quantities actually required.

IV

That said contract provides, among other things, as follows:

1. That the Road Commission would each month estimate the amount of work performed by Plaintiff and compute the value thereof from the unit prices, and after deducting Five (5) per cent retainage, pay Plaintiff therefor once a month for the work performed in the preceding month. (Contract, Paragraph 10)

2. That the Road Commission, subject to certain qualifications, would have the right to increase the quantities of work as may be necessary to complete the project, and that Plaintiff would perform any such item at the same price as that bid upon the original quantity. (Standard Specifications, Sec. 1.4.2., p. 12)

3. That for any item not included in the original contract there might be executed a supplemental agreement at a price therefor agreed by the parties as a fair and reasonable price. (Standard Specifications, Sec. 1.4.2, p. 12)

4. That the performance of all items of work would be under the supervision and control of the Road Commission through its Engineer, which Engineer is the said Wilson H. Ward by virtue of his position as Director of its Construction Division; and that the Road Commission would have the right to suspend work for various reasons, including failure of Plaintiff to obey and carry out orders of the Road Commission personnel. (Standard Specifications, Sec. 1.5.1, p. 16; Sec. 1.8.4, p. 31)

V

That each of the items of work covered by said contract included both the material concerned in said item and the work in putting said item in place, or as the case may be, in removing it from place, and that among, but not all, said items are the following:

1. Item 3-A, Borrow Excavation, the planned or estimated quantity of which, as determined by the Road Commission as necessary for said project, was 22,950 cubic yards, for which Plaintiff's bid and contract price was Seventy-Two Cents (72¢) per cubic yard; and which borrow is earth material secured by the contractor from off the right-of-way, measured in the "cut" of its removal, and used on the right-of-way as fill material.

2. Item 125, Special Rock Fill, the planned or estimated quantity of which, as determined by the Road Commission as necessary for the project, was 278,111 cubic yards, for which Plaintiff's bid and contract price was Seventy-Two Cents (72¢) per cubic yard; and which special rock fill is rock secured by the contractor either on or off the right-of-way, and which is measured in the "fill" (which is in place on the roadway) and used on the right-of-way as fill material of special quality.

3. Item 2, Unclassified Excavation, the planned or estimated quantity of which, as determined by the Road Commission as necessary for the project, was 1,525,000 cubic yards; for which Plaintiff's bid and contract price was Forty-Nine Cents (49¢) per cubic yard; and which unclassified excavation is material cut from the roadway area and measured in the "cut" of its removal, and when suitable, is used in the fills, and if unsuitable, is "wasted," that is, disposed of off of the project.

4. The following miscellaneous items of the following estimated quantities and bid prices:

ITEM NO.	DESCRIPTION	ESTIMATED QUANTITY	UNIT BID PRICE
6A	Structure Excavation	19,263 CY	$ 2.25
71	Class A Concrete	891 CY	55.00
107	Cr. Stone, Sand or Gravel for Underdrain	2,322 CY	7.50
107A	Cr. Stone, Sand or Gravel for Culvert Foundation	8,509 Tons	4.50

127A	Maintaining Traffic	Lump Sum	5,000.00
131C	Temporary Fence	8,500 LF	.15
136	Engineer Field Office	Lump Sum	3,000.00
138	Construction Layout Stakes	Lump Sum	10,000.00
42-c	24" Paved Invert CMP 14 GA	4,946 LF	6.75

CONDITIONS UNDER WHICH PERFORMANCE OF CONTRACT WAS HAD

VI

Plaintiff says that on or about September 6, 1960, he commenced the performance of work under said contract and on September 11, 1962, at the time his work was terminated by the Road Commission, he had performed approximately Eighty Per Cent (80%) of the original contract plus overruns. That the supervision and control of Plaintiff's work was under the Project Engineer (who reported to the Area Engineer), the Area Engineer (who reported to the Assistant District Engineer), the Assistant District Engineer (who reported to the District Engineer), the District Engineer (who reported to the Construction Director), the Regional Engineer (who also reported to the Construction Director), and the Construction Director of the Road Commission itself; that for some time prior to November 1961, Plaintiff was receiving direct from the various echelons of the Road Commission engineering personnel, contradictory and confused directions and orders, which directions and orders were under threats, express and implied, of work suspension for non-compliance, until matters reached such stage that Plaintiff did not know whose directions to follow; that through said period and due to the delays of the Road Commission personnel, it was impossible to satisfactorily proceed, and Plaintiff's equipment and work force were unable to work effectivaly on the project; that at the request of the Construction Director, the project was closed down

on or about November 1961 until the matters could be straightened out; that the project continued to be closed down until the latter part of April 1962; that shortly before the work resumption in the latter part of April 1962, at a conference held on April 4, 1962, it was agreed that Plaintiff would blend with borrow the silty material hereafter referred to in Paragraph XIII, remove certain portions of the special rock fill, with reservation of his rights thereunder, as referred to in Paragraph X, and proceed with several minor items, all as set forth in the letter dated April 16, 1962, from Plaintiff to the District Engineer of the Road Commission confirming such, a copy of which letter is attached hereto marked Exhibit 4, and the Road Commission agreed that it would take the necessary steps to immediately pay Plaintiff for the borrow, referred to in Paragraph VIII; that Plaintiff proceeded according to each particular of his agreement under the direction and supervision of Road Commission personnel, and to their complete satisfaction, until he had reached the point in the orderly progress of work and proper sequence of performance, where he had to borrow more material to place in the fill and be allowed by the Road Commission onto the adjoining project to obtain more special rock fill, and again Plaintiff was delayed by the inaction of the Road Commission and its personnel, and his equipment and work force were unable to work effectively while awaiting their decisions.

BORROW EXCAVATION

VII

That said 22,950 yards of borrow as originally estimated by the Road Commission was insufficient for the completion of the project, and Plaintiff says that the project will require approximately 190,835 cubic yards; that the Road Commission further determined that additional material of a borrow nature was required, which it classified as random borrow, an item of material not listed in the contract, and

the Road Commission estimated the amount of random borrow required as being approximately 35,000 cubic yards, and that the Road Commission and Plaintiff agreed that a fair and reasonable price therefor was the sum of $1.50 per cubic yard.

VIII

That in the spring of 1961, Plaintiff advised the Road Commission that the borrow required would exceed the estimated quantity, and the Road Commission through the Construction Director, on October 6, 1961, did prepare a change order increasing the estimated quantity of borrow, and did forward same to the Plaintiff, that said change order was signed by Plaintiff and his Surety and returned to the District Engineer, and thereafter forwarded to the Construction Director; that after said order was received by the Construction Director, he prepared another in its place for the stated reason some change was required in the contents and such new change order was forwarded down, signed by Plaintiff, his Surety, and the District Engineer, and returned to the Construction Director, where again the same action was repeated and the same sequence of events followed, and the Plaintiff signed approximately five such change orders, all covering the matter of quantity of borrow, the last of which change orders was dated July 6, 1962, a copy of which is attached hereto marked Exhibit 5 and made a part hereof; that a short time previous to the time of the last change order on borrow the said Construction Director also prepared and sent to Plaintiff a supplemental agreement on random borrow; which agreement provided for a price of $1.50 per cubic yard as agreed upon between the Road Commission and Plaintiff, and which supplemental agreement was on June 15, 1962 likewise signed by Plaintiff, his Surety and the District Engineer, and returned to the Construction Director; that said Construction Director during the period covered by the execution of the change orders did not furnish Plaintiff a signed copy of

any of the change orders for the stated reason a new and superseding one was to be issued, and in the summer of 1962 shortly before and at the time of the alleged default, refused to furnish Plaintiff any signed copy of a change order or a signed copy of the supplemental agreement on random borrow.

IX

That after the execution of said first change order by Plaintiff, his Surety, and the District Engineer, Plaintiff was directed by the Construction Director to borrow in excess of the originally estimated quantity and to place the additional amounts in the roadway, which Plaintiff did and continued to do, according to the specifications, as necessary for the roadway construction, and under the inspection and at the insistence of the Road Commission, and that he has placed therein approximately 69,975 cubic yards of borrow in addition to the estimated quantity of 22,950 cubic yards, of value at bid price in the amount of $64,377.

SPECIAL ROCK FILL

X

The item of special rock fill was to be placed in three locations upon the roadway project, the only one here pertinent being the east side of Mud River where it crosses the right-of-way; that Plaintiff secured sources of material suitable for special rock fill, and while to Plaintiff's knowledge no test of suitability of special rock fill is required other than visual inspection, nevertheless the Road Commission had said material examined by laboratory analysis, found it suitable, and approved it for use as special rock fill, a copy of the laboratory reports on which, and letter from Smokey Ball, Project Engineer, are attached hereto, collectively marked Exhibit 6 and made a part hereof; that on November 4, 1960, Plaintiff commenced the performance of this item and placed said special rock fill at the locations called for, with the approval and under the direction and

supervision of the Road Commission personnel; that the performance of said work was included in the monthly estimates, certified by the Construction Director and Road Commissioner to the Commission and Commission Members, approved for payment, and paid for by the Road Commission; that after approximately 100,000 cubic yards of this item had been so placed by Plaintiff, the Road Commission informed Plaintiff a part thereof in the fill on the east side of Mud River was not suitable for special rock fill, and under threat of suspending work on the project for non-compliance, directed Plaintiff to remove 51,442 cubic yards thereof; that after objection and reserving his rights (see Exhibit 6 herewith), Plaintiff on the Road Commission's express direction, removed said 51,442 cubic yards; that after the removal of said rock, the Road Commission, on the next monthly estimate received by Plaintiff, deducted from the amount due Plaintiff for other items of work performed by him, the sum of $37,038.24, representing the 51,442 cubic yards of special rock fill for which the Road Commission had previously paid and then required Plaintiff to remove it. That the cost of said removal of said rock is in excess of the cost of its placement, and a reasonable price for such removal is $2.00 per cubic yard, for a total sum of $102,884, and that Plaintiff claims under the contract he has a right to be paid said said sums of $37,038.24 and $102,884. That Plaintiff placed a total of 160,103 cubic yards of special rock fill, not including the 51,442 cubic yards placed and removed as aforesaid; that of such 160,103 cubic yards, Plaintiff has been paid for 123,558 cubic yards only; that Plaintiff has not been paid for the balance of 36,545 cubic yards, which at bid price is of the value of $26,312.40, and that he has a right to be paid said sum of $26,312.40.

XI

That to replace the said 51,442 cubic yards removed from the special rock fill, and to complete the special rock fill, the Road Commission by laboratory analysis approved

certain material located partly on and partly off the adjoining highway project, hereafter referred to as "Robertson-Fowler project"; the quantity which was partly off said adjoining Robertson-Fowler project being accessible only from said adjoining project, which approval is evidenced by Report on Sample, Laboratory No. 100399, a copy of which is attached hereto marked Exhibit 7; and the Road Commission agreed that it would make a partial acceptance of the roadway area and agreed that Plaintiff could traverse such part of said roadway area to secure the material, which is usual and customary procedure; that notwithstanding said agreement, in the summer of 1962, when the contractor on the Robertson-Fowler project completed the phases of work necessary to allow Plaintiff to traverse part of the roadway to the material source, the Road Commission took no steps to accept said phases of work, although often requested to do so by Plaintiff.

UNCLASSIFIED EXCAVATION AND BLENDING

XII

That upon the direction and order of the Road Commission, Plaintiff was required at various places to excavate below the rough grade line so as to reach stable material, which excavation increased the planned quantity of unclassified excavation; that Plaintiff excavated a total of 1,676,369 cubic yards of unclassified excavation, and has been paid for 1,377,570 cubic yards thereof; that Plaintiff has not been paid for the balance of 298.799 cubic yards, which at bid price is of the value of $146,411.51, and that Plaintiff under said contract claims he has a right to be paid said $146,411.51.

XIII

That upon the direction and order of the Road Commission personnel, under threat of shut-down for non-compliance, Plaintiff was required to place material from unclassified excavation which was silty, of high water

absorption and without compaction, in said fill; that the Road Commission, perceiving the fill would lack suitability, then required Plaintiff to place suitable material in the fill, and, attempting to give such material some binding and compacting quality, directed and ordered Plaintiff, under threat of shut-down for non-compliance, to blend the silty material with suitable material, either unclassified excavation and suitable for fill, or with borrow secured from off the project. That said blending operation or manipulation was not an item in the contract, but is a pay item paid for by the Road Commission as a separate item, the reasonable and fair price of which is Fifty (50) Cenats per cubic yard; and that Plaintiff was compelled to blend approximately 312,600 cubic yards of a total value of $156,300.00, and that Plaintiff claims under the contract that he has a right to be paid the sum of $156,300.00.

EQUIPMENT RENTAL AND OTHER EXPENSE
XIV

That during the numerous delays and after the project was closed down in November 1961, and after resumption of work in April 1962, and during the further delays occasioned by the Road Commission's failure to provide a borrow change order as alleged in Paragraph VIII and its failure to accept the portion of the Robertson-Fowler project so Plaintiff could secure special rock fill, as alleged in Paragraph XI, much of Plaintiff's equipment and work force were unable to work effectively; that by letter of November 6, 1961 to the District Engineer, copy of which is attached hereto marked Exhibit 8, the Road Commission was notified of Plaintiff's charge for equipment rental and other expenses and that he did not expect to be charged with working time for the periods in which he had been delayed by the Road Commission; that the equipment rental and stand-by expense is part of the cost of said project, and is a separate item customarily paid for by the Commission, and that the cost of such equipment rental is

$681,881.57, and the cost of other stand-by expense is approximately $95,000; and that Plaintiff claims he has a right to be paid said sums of $681,881.57 and approximately $95,000.

MISCELLANEOUS ITEMS PERFORMED AND UNPAID
XV

The following miscellaneous items, as referred to in Paragraph V, Subparagraph 4, have been performed by Plaintiff in the quantities indicated; that all of the quantities are within the estimated quantities, and which at bid price are of the values as indicated, and that Plaintiff has not been paid the sums due for the quantities indicated:

Item No.	Description	Unit Bid Price	Total Quant. Performed	Quantity Unpaid	Amount
6A	Structure Excavation	$ 2.25 CY	13,166 CY	3,216	7,236.00
71	Class A Concrete	55.00 CY	891 CY	16	880.00
107	Cr. Stone, Sand or Gravel for Underdrain	7.50 CY	1,045 CY	486	3,645.00
107A	Cr. Stone, Sand or Gravel for Culvert Foundation	4.50 Ton	8,509 Tons	459	2,065.50
127A	Maintaining Traffic	Lump Sum 5,000.00	100%	100%	5,000.00
131C	Temporary Fence	.15 LF	8,500 LF	2,433	364.95
136	Engineer Field Office	Lump Sum 3,000.00	100%	33-1/3%	999.00
138	Construction Layout Stakes	Lump Sum 10,000.00	100%	30%	3,000.00
42-c	24" Paved Invert CMP 14 GA	6.75 LF	2,031 LF	1,064	7,182.00

Plaintiff claims that under the contract he has a right to be paid the sums so indicated totaling $38,306.95.

THE ALLEGED DEFAULT

XVI

In July 1962, the District Engineer and Road Commissioner advised Plaintiff the progress on the work was not satisfactory to them, and noted six matters which Plaintiff says were not valid objections to the progress of his work, and the Road Commissioner threatened to take the project from Plaintiff; by letter dated July 23, 1962, Plaintiff replied, showing that said six matters were not valid objections, a copy of which letter is attached hereto marked Exhibit 9, and to which reference is made for full details of the reply; and as appears therefrom, all of the Road Commission's objections were without substance; that by letter dated August 21, 1962, the Road Commissioner notified Plaintiff the Road Commission had defaulted his contract, on the alleged grounds Plaintiff "has delayed, neglected and defaulted . . . to commence the performance and completion of the work", a copy of which letter is attached hereto, marked Exhibit 10; that at Plaintiff's request the Road Commissioner shortly thereafter held a conference, at which time the Road Commission flatly refused to take the necessary steps to secure to Plaintiff payment for the borrow which the Commission had previously directed Plaintiff to place in the project, and forbade him to do any of the other items of work which it was Plaintiff's right to prosecute; and to the end that the Road Commission might possibly rescind the notice of alleged default, demanded that Plaintiff forthwith proceed with replacing special rock fill which it ordered him to remove; that Plaintiff then agreed that with the Project Engineer he would recanvass the locality to determine if any other material sources were available and acceptable to the Road Commission for special rock fill; and the Road Commission agreed it would take immediate steps to expedite the accept-

ance of a portion of the adjoining project so that special rock fill could be obtained therefrom, and that another conference would be held as soon as Plaintiff had canvassed the locality; that Plaintiff canvassed the locality with the Project and samples were taken from further sources, and the Road Commission of its own volition resampled the source on the adjoining project which is had previously approved as shown by Exhibit 7, which samples from further sources the Road Commission declared unsuitable, and the resampling from the previously approved source on the adjoining project the Road Commission then also declared unsuitable, as shown by Exhibit 11 attached hereto; that the Road Commission then took no action to accept the adjoining project, that Plaintiff had no approved material which he could immediately place in the special rock fill; that the Road Commission refused any further conferences, ordered Plaintiff from the project, and when he continued to work the items which could still be performed, removed the Project Engineer so he could proceed no further.

XVII

That the Road Commission, after said alleged default, did cause the project to be cross-sectioned by the firm of Michael Baker, Jr., Consulting Engineers; that Plaintiff had a right to, and requested that there be furnished him the complete results of the survey by Michael Baker, Jr., Inc., which results would show all of the work performed by him, but such right and request was refused by the Construction Director; that thereafter the Road Commission did advertise the balance of the work to be performed for a re-letting, and that the low bid received for the completion of the balance of the work was $1,037,855.02; that the Road Commission has informed Plaintiff that under the terms of the contract and bond it will charge back to such sums as may be due him from the Road Commission and to the bond obligation of himself and his Surety, such cost of completion of said project as exceeds the amount that would

have been paid to Plaintiff for completion. That the Road Commission, as an arm of the State, is immune from suit for damages, and remedy therefor would be entirely unavailing for compensation of Plaintiff's loss, and that the Road Commission has publicly declared Plaintiff has defaulted on said contract; and by said declaration has damaged and continues to damage Plaintiff in business and personal standing, and if the Road Commission is permitted to re-let said contract, this Plaintiff will be irreparably injured.

XVIII

Plaintiff claims that the Road Commission, the Road Commissioner and Construction Director were without right or authority in holding Plaintiff to be in an alleged default of said contract and in ordering Plaintiff from the project and subsequently attempting to re-let same, for the following reasons:

1. That by refusing to provide Plaintiff with borrow change orders, and by refusing to pay Plaintiff for the borrow which he had placed in said roadway under the direction and supervision of the Road Commission, the Road Commission was in default of the contract in a manner which rendered impossible Plaintiff's further performance of the work.

2. That by compelling Plaintiff, under threat of shutdown for non-compliance, to blend unsuitable material with suitable material in an attempt to upgrade its quality, and without paying him for such operation, the Road Commission was in default of the contract in a manner which rendered impossible Plaintiff's further performance of the work.

3. That by compelling Plaintiff, under threat of shutdown for non-compliance, to remove 51,442 cubic yards of special base fill as unsuitable material, which material was in fact suitable and which the Road Commission had previously approved and directed and supervised its place-

ment, without paying him for such removal, and in back-charging him for the amount already paid for its placement, the Road Commission was in default of the contract in a manner which rendered impossible Plaintiff's further performance of the work.

4. In compelling Plaintiff, under threat of shut-down for non-compliance, to immediately proceed with replacing the special rock fill, to the exclusion of all other items of work, the performance of which was his right, and after Plaintiff had already once placed such fill with suitable material, the Road Commission was in default of the contract in a manner which rendered impossible Plaintiff's further performance of the work.

5. That by delaying Plaintiff in his performance of the work, the Road Commission was in default of the contract in a manner which rendered impossible Plaintiff's further performance of the work.

6. In inducing Plaintiff to rely on traversing part of the adjoining project that he might secure special rock fill acceptable to the Commission, and then precluding him from securing it and immediately demanding that he forthwith replace the special rock fill, the Road Commission failed to cooperate and was in default of the contract in a manner which rendered impossible Plaintiff's further performance of the work.

7. That by refusing to pay Plaintiff for all of the unclassified excavation, for all of the special rock fill, and for the miscellaneous items of work performed as set forth in Paragraph V, Subparaph 4, the Road Commission was in default of the contract in a manner which rendered impossible Plaintiff's further performance of the work.

And although requested so to do, the Road Commission has refused to rescind its notice of alleged default and denies Plaintiff's claim that Plaintiff is not in default of said contract.

XIX

Plaintiff claims that under the contract the Road Commissioner and Construction Director were without right or authority in failing to certify, and that they each did have a duty to certify, the performance of the items of work and the services and materials supplied, and the amounts due therefor, as referred to in the paragraphs enumerated following:

Paragraph	IX	$ 64,377.00
"	X	37,038.24
"	X	102,884.00
"	X	26,312.40
"	XII	146,411.51
"	XIII	156,300.00
"	XIV	681,881.57
"	XIV	95,000.00
"	XV	28,306.95
TOTAL		$1,338,511.67

And Plaintiff claims under the contract he has a right to be paid the said sum of $1,338,511.67 for the work performed, as hereinabove set forth; that the Road Commission and Commission Members have no right or authority to withhold payment of the above sums, and have a duty to certify and issue requisitions for the payment thereof upon the State Auditor; and that the same has not been done and that the same have not been paid; that same is past due and owing from the Road Commission to Plaintiff, and although payment has been requested, the Road Commission and Road Commissioner have denied Plaintiff's claim and right to payment and have refused certification of the performance and the issuance of requisition for payment thereof upon the State Auditor.

Wherefore, the Plaintiff prays that the Court will:

1. Hear evidence on the disputed questions of fact to be submitted to a jury, trial by jury being herewith demanded.

2. Declare that said contract is not in default by the Plaintiff, and declare the right of the Plaintiff to proceed with the performance of the contract.

3. Declare the right of the Plaintiff to have the Construction Director and Road Commissioner certify the performance of said quantities of work which are completed and unpaid; and the right of the Plaintiff to have the Road Commission and Commission Members issue requisitions for the payment thereof upon the State Auditor.

And for further and coercive relief the Plaintiff asks judgment as follows:

1. That the Commission Members and the Road Commissioner be compelled to cancel and set aside for naught any such part of the records of the Road Commission as may show said contract in default.

2. That the Construction Director and Road Commissioner be compelled to perform their duty and certify to the Road Commission and Commission Members the performance of the work by Plaintiff to date and the amount due therefor, and upon such certification the Road Commission and Commission Members be compelled to perform their duty to issue the requisition of the Road Commission to the State Auditor for payment thereof.

3. That the Road Commission, the Road Commissioner, and Construction Director be compelled to return the necessary Project Engineer to said project to proceed with his customary duties in connection therewith, and be restrained from any interference with the Plaintiff in his return to said work, and restrained from any interference with the Plaintiff in his work except for good cause subsequent arising.

4. That the Road Commission and the Road Commissioner be enjoined from letting any other or further contract to any other person for the balance of the work to be performed on said project, except for good cause subsequently arising.

5. For such other and further relief, both general and special, as to the Court may seem appropriate in the premises.

/s/ Carney M. Layne
Attorney at Law
638 Fifth Avenue
Huntington, West Virginia

/s/ Charles W. Yeager
Steptoe & Johnson
Attorneys at Law
Kanawha Valley Building
Charleston, West Virginia

Attorneys for the Plaintiff Howard Price dba Howard Price and Company

APPENDIX J

HOWARD PRICE, d/b/a
HOWARD PRICE & COMPANY,

Plaintiff,

vs. For Declaratory Judgment and Coercive Relief
Civil Action No. 3479

THE STATE ROAD COMMISSION
OF WEST VIRGINIA, *et al,*

Defendants.

STATE OF WEST VIRGINIA,

COUNTY OF CABELL, to-wit:

REPLY AFFIDAVIT IN OPPOSITION TO PAPER WRITINGS FILED HEREIN BY DEFENDANTS AND STYLED MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS FOR WANT OF JURISDICTION, AND THE AFFIDAVITS ATTACHED THERETO

Howard Price, being by me first duly sworn, deposes and says as follows:

1. That he resides at 2829 Roseneath Road, Huntington, Cabell County, West Virginia; that he is the plaintiff in Civil Action No. 3479 now pending in the Circuit Court of Kanawha County, West Virginia, styled "Howard Price dba Howard Price & Company v. State Road Commission, a corporation, et als"; that he makes this affidavit in opposition to the paper writings filed herein by the defendants and styled "Motion for Summary Judgment" and "Motion to Dismiss for Want of Jurisdiction," and that he has personal knowledge of the facts herein set forth.

2. That he is fifty-six years of age; that he has been in the highway construction business all of his adult life; that

moth his father and grandfather were highway contractors before him; that in 1927 he became associated with his father and four brothers in the highway construction business as a principal in the firm known as Price Construction Company, Inc.; that in 1948 he started his own highway construction firm, doing business as Howard Price & Company, and that at that time was prequalified before the State Road Commission of West Virginia to the extent of Fifty Thousand Dollars ($50,000.00); that the amount of a contractor's prequalification is determined by his assets, experience and record of performance, and that in May 1961 his prequalification amount had been increased by the State Road Commission to Two Million, Nine Hundred Thousand Dollars ($2,900,000.00); that his work has been principally grading and draining, as was the work in question in this proceeding; that either as a principal in the corporation aforesaid or through his own firm he has held contracts from the State Road Commission of West Virginia, the Department of Highways for the State of Kentucky, the Department of Highways for the State of Ohio, the United States Engineers, the U. S. Department of the Navy, the C. & O. Railway, and other governmental agencies and companies; that previous to the time the Road Commission declared the supposed default as alleged in the affidavit of R. D. Bryant, he has never defaulted in any contract or had any work taken from him; that the majority of his contracts in the thirty-six years in which he has been a principal in the corporation aforesaid or owned his own contracting firm, have been for the State Road Commission of West Virginia, and to his knowledge said Commission has never expressed any dissatisfaction with the performance of his contracts, previous to the contract involved in the proceeding above mentioned.

2. That until he was removed by the State Road Commission from the project involved in this proceeding, he personally supervised the performance of the work thereon, and the facts alleged in the complaint filed by him are true.

4. That he has read the affidavits made by R. D. Bryant and Wison Ward, each of which is styled "Affidavit in Support of Motion To Dismiss and Motion for Summary Judgment."

5. That he has closely observed the progress of the work of V. N. Green & Co., Inc. on the project involved in this proceeding, and that the final measurement of qualities of work performed thereon could have been made and concluded any time within the past sixty days.

6. That there is no bona fide substantial controversy as to his compliance with the contract, and the items of work and service performed and rendered by him, the quantities thereof or the amounts due therefor.

7. That on further proceedings he will offer in evidence documents, records and competent and qualified testimony which will show that there is no bona fide substantial controversy as to his compliance with the contract, the items of work and service performed and rendered by him, and the quantities thereof and amounts due therefor.

HOWARD PRICE.

Taken, subscribed and sworn to before me by Howard Price in my County and State aforesaid, this the 5th day of December, 1963.

My commission expires March 19, 1969.

L. J. MEISEL,
Notary Public in and for
Cabell County

APPENDIX K

ENTERED
In Circuit Order Book
FEB 23 1965
No. 10
Page 450

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22d day of February, 1965, the following order was made and entered, to-wit:

Howard Price d/b/a Howard Price and Company

vs. Civil Action No. 3479

The State Road Commission of West Virginia, a corporation, et al., etc.

On a former day, to-wit, December 30, 1964, came the petitioner, Howard Price, doing business as Howard Price and Company, by Carney M. Layne and Charles W. Yeager, his attorneys, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Kanawha County rendered in this action on the 19th day of May, 1964, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the appeal prayed for is refused.

A True Copy

Attest: KENNETH E. HINES,
Clerk Supreme Court of Appeals

APPENDIX B

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1964

HOWARD PRICE D/B/A HOWARD PRICE AND COMPANY
Appellant

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, BURL A. SAWYERS, AS STATE ROAD COMMISSIONER, AND WILSON H. WARD, AS DIRECTOR OF THE CONSTRUCTION DIVISION, STATE ROAD COMMISSION OF WEST VIRGINIA
Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

ROBERT SARVER
istant Attorney General
te of West Virginia
rleston, West Virginia

C. DONALD ROBERTSON
Attorney General
State of West Virginia
Charleston, West Virginia

PHILIP J. GRAZIANI
Assistant Attorney General
State of West Virginia
Charleston, West Virginia
Counsel for Appellees

No. ___

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

HOWARD PRICE, d/b/a HOWARD PRICE AND COMPANY

Appellant

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, a corporation, BURL A. SAWYERS, AS STATE ROAD COMMISSIONER, AND WILSON H. WARD, AS DIRECTOR OF THE CONSTRUCTION DIVISION, STATE ROAD COMMISSION OF WEST VIRGINIA

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

MOTION TO DISMISS

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the jurisdictional statement of appellant be dismissed on the ground that the federal question sought to be reviewed was not timely or properly raised in the Circuit Court of Kanawha County, West Virginia, and on the further ground that the state court did not expressly pass on the federal question sought to be reviewed.

STATEMENT OF THE CASE

Appellant entered into a highway construction contract with the Road Commission for the construction of a portion of Interstate Highway 64. The Road Commissioner declared the performance of appellant under his contract to be in default, and caused the appellant to be removed from the project. The appellant alleges that the Road Commissioner acted arbitrarily and without right or authority, and from this basic difference in positions there arises a multitude of substantial controversies of fact.

The appellant instituted a declaratory judgment proceeding in the Circuit Court of Kanawha County, West Virginia, seeking declaratory judgment as to the rights of appellant under the construction contract entered into by him and the State Road Commission of West Virginia, asking: (1) That the rights of the parties be declared; and, sequentially, (2) That, after a declaration of rights, the Commissioner be compelled to perform

his statutory duty to audit appellant's claim for work performed by appellant.

On May 19, 1964, the Court entered its final judgment order sustaining appellees ' motion to dismiss the proceeding as a suit against the State. This is the judgment upon which review is sought.

ARGUMENT

I

Appellant's principal contention is that he has been deprived of his property without due process of law. He complains of the fact that he has not had his day in court, and has had no judicial determination of the merits of his case.

The Supreme Court of the United States lacks jurisdiction of appellant's case because appelant has not exhausted his remedies in the State of West Virginia. The existence of ample and efficient administrative remedies under State laws, and the failure of appellant to resort to them in the state court, prevents him from taking advantage of a federal question involved in the case, and securing a review by the federal Supreme Court. Mellon Co. v. McCafferty, 239 U. S. 134. Certiorari does not lie to determine whether State procedure deprives one of due process if petitioner has not invoked the proper state remedy to have such matter determined. Phyle v. Duffy, 334 U. S. 431.

Article III, Section 9, of the Constitution of West Virginia, states:

> "Private property shall not be taken or damaged for public use, without just compensation; nor shall the same be taken by any company, incorporated for the purposes of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged, for public use, or for the use of such corporation, the compensation to the owner shall be ascertained in such manner, as may be prescribed by general law; provided, that when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders.

In effect, appellant is complaining that, in addition to the Fourteenth Amendment to the United States Constitution, the above-cited provision has been violated as well, and that his property, services and livelihood has been "taken" by the actions of the State Road Commissioner. If this be the case, appellant's proper, and still available, course was and is to institute proceedings in mandamus to compel Eminent Domain proceedings. State v. Graney, 143 W. Va. 643, 103 S. E. 2d 888; Riggs v. State Road Commissioner, 120 W. Va. 298, 197 S. E. 813; Hardy v. Simpson, 118 W. Va. 440, 190 S. E. 680; Childers v. State Road Commissioner, 124 W. Va. 233, 19 S. E. 2d 611. These cases uphold the proposition that such mandamus action will lie.

This is not to be confused with the mandamus procedure upheld by the West Virginia Supreme Court of Appeals in Draper v. Anderson, 102 W. Va. 633, 135 S. E. 837. In Draper, there was no great controversy over facts. The labor had been performed under a contract and the Road Commissioner has a "plain legal duty" to issue a warrant to the Auditor. In the present case, there is a controversy as to whether appellant did perform his part of the contract.

The Circuit Court of Kanawha County, in considering this declaratory judgment proceeding, held that the rights of appellant in this proceeding could rise no higher than the rights the appellant would have in an application for a writ of mandamus under the holding in the case of Draper v. Anderson, Supra, because the nature of the relief sought was the payment of money out of the treasury of the State for claims uncontrovertedly shown to involve substantial controversies of fact by the affidavits filed with appellees' motion to dismiss the complaint for lack of jurisdiction.

While the issue of eminent domain proceedings in connection with personal property is not as well established as is that issue as concerns real estate, it is not unknown. A court of claims case has held that a contractual right is within the protection of the Fifth Amendment prohibiting the taking of private property for public use without just compensation. Johnson v. United States, 78 F. Supp. 208. A Texas decision has held that a "going business" is "property" for which recovery can be had in eminent domain

proceedings. Priolo v. City of Dallas, 234 S. W. 2d 1014.

Article III, Section 9, supra, of the West Virginia Constitution, contains no qualification that the "property" can be only real property, nor does the Fourteenth Amendment to the Constitution of the United States, relied upon by appellant. In addition, eminent domain proceedings instituted by the Road Commissioner would ensure a full judicial hearing, with a jury, as desired by appellant. He would have his day in court to air the issues.

II

Appellant has also failed to make use of the procedures for making claims against the State in accordance with Chapter 14, Article 2, of the Code. As stated in Section 1 of the above-cited Chapter and Article:

> "The purpose of this article is to provide a simple and expeditious method for the consideration of claims against the state that because of the provisions of section thirty-five, article six of the constitution of the state, and of statutory restrictions, inhibitions or limitations, cannot be determined in a court of law or equity; and to provide for proceedings in which the state has a special interest."

Prior to 1953, these matters came under the State Court of Claims, but now they are administered by the Attorney General, who, like the

Court of Claims, "* * * is hereby authorized to act as a special instrumentality of the legislature for the purpose of considering claims against the state, which because of the provisions of section thirty-five, article six of the constitution of the state, * * * cannot be heard in a court of law * * *." Code 14-2-3. (Section 35, Article VI is the governmental immunity from suit provision.)

Code 14-2-4 confers the Attorney General's jurisdiction:

> "The jurisdiction of the attorney general, under the provisions of this article, except for the claims excluded below, shall extend to the following matters:
>
> "1. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state or any of its agencies, which the state as a sovereign commonwealth should in equity and good conscience discharge and pay.
>
> "2. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, which may be asserted in the nature of set-off or counterclaim on the part of the state or any of its agencies.
>
> "3. The legal or equitable status, or both, of any claim referred to the attorney general by the head of a state agency for advisory determination."

Code 14-2-5 provides:

"The jurisdiction of the attorney general shall not extend to any claim:

"1. For loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the state.

"2. For injury to or death of an inmate of a state penal institution.

"3. Arising out of the care or treatment of a person in a state institution.

"4. For a disability or death benefit under chapter twenty-three of this Code.

"5. For unemployment compensation under chapter twenty-one-a of this Code.

"6. For relief or public assistance under chapter nine of this Code.

"7. With respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state."

III

Appellant has been told by the Circuit Court of Kanawha County and by the Supreme Court of Appeals that he cannot maintain his action utilizing the remedy that he has selected, i.e.,

declaratory judgment proceedings, since such proceedings, and the relief sought therein, if fully granted, would result in the controlling of the discretion of an official of the State, in a situation where such official must exercise his discretion in order to carry out the duties of his office. See Douglass v. Koontz, 137 W. Va. 345, 71 S. E. 2d 319.

The declaratory judgment proceeding chosen by appellant is a suit against the State in violation of Article VI, Section 35, of the West Virginia Constitution, and therefore the Circuit Court of Kanawha County properly sustained appellees' motion to dismiss the complaint for lack of jurisdiction.

CONCLUSION

Appellant has the protection of Article III, Section 9, of the Constitution of West Virginia, and has the perfect right to seek a writ of mandamus to require the Road Commissioner to institute eminent domain proceedings to award just compensation for property allegedly taken by the Road Commissioner for public use. In the event that appellant is denied such a writ of mandamus, then appellant has the statutory right to prosecute a claim against the State of West Virginia under the provisions of Chapter 14 of the Code of West Virginia.

For the reasons herein cited and discussed, it is respectfully submitted that appellant has not exhausted his remedies under the Constitu-

tion and the laws of the State of West Virginia, therefor the federal question is not properly before the court and accordingly his application for appeal should be denied.

Respectfully submitted,

C. DONALD ROBERTSON
Attorney General
State of West Virginia
Charleston, West Virginia

PHILIP J. GRAZIANI
Assistant Attorney General
State of West Virginia
Charleston, West Virginia

Counsel for Appellees.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

PRICE D/B/A HOWARD PRICE & CO. *v.* STATE ROAD COMM'N OF WEST VIRGINIA ET AL.

APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA.

No. 144. Decided October 11, 1965.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed in light of the representations of the Attorney General of West Virginia that there is open to the appellant an effective state procedure of which he has not availed himself.

APPENDIX D

State of West Virginia
THIRTEENTH JUDICIAL CIRCUIT
Charleston

Frank L. Taylor
Judge

March 11, 1966

Carney M. Layne, Esq.
Attorney at Law
638 Fifth Avenue
Huntington, West Virginia

James W. St. Clair, Esq.
Attorney at Law
523 Seventh Street
Huntington, West Virginia

Charles W. Yeager, Esq.
Attorney at Law
608 Kanawha Valley Building
Charleston, West Virginia

Benjamin A. Ritchie, Esq.
Anthony G. Halkias, Esq.
Legal Division, State Road Commission
1800 Washington Street, East
Charleston, West Virginia

Gentlemen:

Howard Price, dba Howard Price, and Company vs. The State Road Commission of West Virginia and Burl A. Sawyers as State Road Commissioner

In 1963 this plaintiff instituted an action in this Court against the State Road Commission of West Virginia, the Road Commissioner, individual members of the Road Commission, and the Director of the Construction Division of the Road Commission, praying for declaratory relief and

for coercive relief, to compel the then defendants to cause to be paid to him from State funds an amount of money which he claimed to be due under a construction contract entered into between him and the State Road Commission. That case was subsequently heard on a motion to dismiss, which motion was sustained upon the ground that it was an action against the State within the inhibition of Article VI, Section 35 of the West Virginia Constitution. That section is as follows:

> "The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee."

From the judgment of this Court in dismissing his action the plaintiff appealed to the Supreme Court of Appeals of West Virginia, and that Court declined appellate relief. The plaintiff then appealed to the Supreme Court of the United States for a writ of certiorari to review the findings of this Court and of the Supreme Court of Appeals, whereupon the Attorney General of West Virginia, who is required by statute to represent the State in all matters pending in Federal courts, appeared and made a motion to dismiss upon the ground that the appellant, plaintiff here, failed to make use of remedies available to him under State statutes. These remedies were described by the Attorney General as being (1) a proceeding in mandamus to compel eminent domain proceedings, and (2) the claim procedure against the State as provided for in Chapter 14, Article 2 of the Code of West Virginia. Thereupon, the Supreme Court of the United States, by a *per curiam* opinion, dismissed the appeal upon the representations of the Attorney General.

The plaintiff has now filed his petition in this Court praying for a writ of mandamus, to compel the present defend-

ants, that is, The State Road Commission of West Virginia, a corporation, and Burl A. Sawyers as State Road Commissioner, to inrtitute and prosecute an eminent domain proceeding in the proper court to condemn and ascertain the value of the rights of the plaintiff under his construction contract with the State. The rule in mandamus was granted, and the defendants, not now represented by the Attorney General, demurred to the petition upon several grounds. The first of these grounds is that this proceeding contravenes the provisions of Article VI, Section 35 of the Constitution. The petitioner here strongly contends and argues that Article VI, Section 35 of the Constitution of West Virginia contravenes the provisions of the United States Constitution forbidding the denial of due process of law, and the provisions of the Federal and State Constitutions inhibiting the taking of private property without just compensation and denying equal protection of the law, as applied to this petitioner.

I have carefully compared the petition herein with the complaint formerly filed, which complaint was exhibited with the petition. The petition here, aside from the demand for mandamus, is in effect and by similarity of language practically the same as the complaint filed in the former action. The contract is described in the same manner, the alleged default is described in the same manner, and the claim asserted by the petitioner is practically for the same amount of money, it having been increased slightly in this petition over the amount demanded in the complaint in the former action.

Many questions have been argued and briefed by counsel dealing with issues which they claim arise in this case. However, I am of opinion that there are two issues which are decisive of the question here involved. The first of these is whether or not this contract is a proper subject for an eminent domain proceeding, and the second is whether or not the Attorney General, by his action in appearing before the Supreme Court of the United States and making the

motion to dismiss, has estopped the State from its right to defend upon the ground that this is in effect an action against the State.

As noted, Article VI, Section 35 of the Constitution of West Virginia differs from the Federal Constitution in that it prohibits absolutely any action against the State, except in garnishment proceedings, whereas the Federal Constitution makes provision that the Government of the United States may not be sued without its consent. It is apparently the Federal rule that contract rights between the nation and individuals are only binding upon the conscience of the sovereign, and have no compulsive force and confer no right of action independent of the will of the sovereign. See *Monaco* v. *Mississippi*, 292 U. S. 313, 78 L. ed. 1282, and *Lynch* v. *United States*, 292 U. S. 571, 78 L. ed. 1434. However in *Miller* v. *Board of Agriculture*, 46 W. Va. 192, dealing with the West Virginia Constitution, it was held that "A mere contract will not be enforced by mandamus." In discussion of this point, the following language is used in the opinion written by Judge Brannon:

> "* * * A contract with the State is without legal sanction, as it cannot be enforced by judicial action. The only remedy is appeal to the officers charged with its execution, and, when executed, to the Legislature to pay. * * *"

It is true that in that instance the Court was speaking of an executory contract, but it is my opinion that the principle prevails here. I can conceive of no manner in which this or any other court having jurisdiction in matters of eminent domain can properly entertain a proceeding dealing with the subject such as is found here.

This question, however, is not completely controlling. The action of the Attorney General in making his motion in the Supreme Court of the United States may or may not have been ill-advised. It is true that the Attorney General of West Virginia is the chief law officer of the State. See

State v. *Ehrlick*, 65 W. Va. 700. However, the question here is whether, being clothed with this authority, the Attorney General can estop the State and waive its rights. As was said in *State* v. *Chilton*, 49 W. Va. 453, 456:

> "'Grants of power to public officers are usually subjected to strict interpretation, and will be construed as conferring those powers only which are expressly imposed or necessarily implied. Such an officer can create rights against the State or other public authority represented by him only while he is keeping strictly within the limits of his authority as so construed.' * * * 'This rule is indispensible to guard the public against loss and injury from the fraud, mistake or rashness and indiscretion of their agents.' * * * *"*

I have read much authority upon the question of judicial estoppel arising in instances such as this, some of which has been cited to me by counsel and some of which I have discovered by my own research. It is said in *7 Am. Jur. 2d, Attorney General*, § 15:

> "Although there is some authority to the contrary, it is generally held that unless duly authorized by law, the attorney general may not waive the immunity of the state from suit, and thus cannot bind the state by appearing in an action so as to give the court jurisdiction. Nor can the attorney general give up rights of the state by an admission in court as to the legal effect of a statute."

In *19 Am. Jur., Estoppel*, § 77, the rule is laid down that a court cannot acquire jurisdiction of the subject matter of litigation by estoppel.

And in *49 Am. Jur., States, Territories and Dependencies*, § 96, it is stated in a footnote that where the state merely makes a special appearance for the purpose of protesting against the court's jurisdiction, there is no waiver of immunity.

In *Cunningham* v. *County Court of Wood County* (W. Va. 1964), 134 S.E. 2d 725, it is said at page 729:

> "The general rule is that estoppel may not be invoked against a governmental unit when functioning in its governmental capacity. 31 C.J.S. Estoppel §§ 138-142, pages 675-719; Anno., 1 A.L.R. 2d 338."

In the annotation just referred to in the quotation, the subject is discussed and many cases are cited with the statement made that claims cannot be created against the State by estoppel.

In the recent case of *Main* v. *Department of Highways* (Va. 1965), 142 S.E.2d 524, the statement is made that the doctrine of estoppel cannot apply to the rights of a state when acting in its sovereign or governmental capacity. See also *Ford Motor Company* v. *Treasury Department*, 323 U.S. 459, 89 L. ed. 389.

While the foregoing discussion, in my opinion, necessitates action on my part in sustaining point one of the demurrer, and while I believe that to be decisive of the controversy presented on this record, yet, being in this instance a court of original jurisdiction, it is probably incumbent upon me to rule upon the other questions raised on the record. While I personally entertain considerable compassion for the petitioner here, he being left, in the words of Judge Brannon, *supra*, as having a contract without legal sanction which cannot be enforced by judicial action, yet I must take further note of the position taken by the Supreme Court of Appeals in *Cunningham* v. *County Court of Wood County*, *supra*, in which it is said that:

> "* * * This Court * * * is sternly and unmistakably enjoined to leave drastic changes in the common law to the legislative branch of the state government. Currently it is widely debated that the rule of governmental immunity should be abolished. We firmly believe, however, that this Court should not undertake, by judicial pronouncement, to abrogate a legal principle which has through a long period of years been so basic in the laws of this state."

If that be true, how much more incumbent it is upon me as a judge of a *nisi prius* court to observe the Constitution and the common law of the state, and to declare as constitutional that part of the common law which has so long been pronounced in this State. I personally am of opinion that the doctrine of immunity of the sovereign as stated in our Constitution, is archaic and completely out of step with the times, when we observe the government, state and federal, engaging in big business. However, this is the rule, and I do not believe that I have the authority, or the right, or the duty to declare that section VI, Article 35 of the Constitution of West Virginia contravenes any other section or part of either the Federal or State Constitution.

The second ground of the demurrer, to the effect that this properly involves the exercise of discretion on the part of the respondents, has already been decided by me in the former opinion written in the other proceeding on April 13, 1964, and is, in my opinion, now *res judicata*.

Grounds 3, 4, 5 and 6 of the demurrer relate to the type of property which is sought to be compelled to be condemned by this proceeding, and in my opinion the discussion had heretofore in this memorandum is decisive of those questions.

Ground 7 of the demurrer raises the question of whether or not the petitioner should have pursued and exercised his remedies of prosecuting a claim against the State through the office of the Attorney General. While this may be a proper answer in this kind of case (*Miller v. Board of Agriculture, supra*), yet I am not prepared to say that the prosecution of such a claim constitutes a legal remedy and gives the petitioner a day in court. However, I do not believe that it is necessary to rule upon that ground of the demurrer since here the petitioner is seeking to have his rights determined by a court and not by the executive and legislative branch of the government.

Grounds 8 and 9 raise the question of *res judicata*, and as heretofore indicated, I believe that the questions to which those grounds of the demurrer relate were decided by me in the former proceeding.

The tenth ground of the demurrer asserts that the petition fails to show a clear legal right in the petition. Even assuming that the petitioner has, by virtue of his contract with the Road Commission, acquired a vested property right subject to condemnation, and recognizing that our State Supreme Court of Appeals has construed Article III, Section 9 of the West Virginia Constitution as authority for instituting a suit to compel the State Road Commissioner, by mandamus, to compensate owners of property taken for road purposes, it is an established requirement in this State that such a suit must be predicated upon a showing of a clear legal right to the relief sought. As heretofore indicated, I have carefully compared the petition herein with the petition in the former proceeding and find that they are substantially identical, and that the present petition fails to show a clear legal right in the petitioner.

The eleventh ground of the demurrer, in my opinion, goes outside the record, and should be overruled, but I believe this ground bears no relation to the case at hand.

For the foregoing reasons, based upon the authorities cited herein and in the former opinion, which is exhibited with the record, and based upon the conclusions which I have reached, it is my judgment that the petition here in mandamus is merely a further effort on the part of the petitioner to enforce a right which, under the West Virginia Constitution, he cannot enforce in this proceeding, and I am, therefore, of opinion to sustain points 1, 2, 3, 4, 5, 6, 8, 9 and 10 of the demurrer, deny the writ of mandamus, and dismiss the petition.

A proper order in conformity herewith, and making this letter memorandum of opinion a part of the record, should

be tendered promptly for entry. A copy for that purpose may be obtained from my secretary.

Very truly yours,

FRANK L. TAYLOR, *Judge*

FLT:R

APPENDIX E

HOWARD PRICE, d/b/a
HOWARD PRICE AND COMPANY

v. Upon Mandamus—Civil Action No. 6098

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS AS STATE ROAD COMMISSIONER

On the 29th day of January, 1966 came the Petitioner Howard Price dba Howard Price and Company, by Carney M. Layne and Charles W. Yeager, his counsel, and came the Respondents, the State Road Commission of West Virginia, a corporation, and Burl A. Sawyers, as State Road Commissioner, by Benjamin A. Ritchie, their counsel; and this matter having been regularly docketed for further proceeding this date, came on to be heard upon the mandamus petition, the order entered January 5, 1966 filing said petition; upon the rule directed to the Respondents to show cause why a writ of mandamus should not be awarded against them as prayed for in said petition, issued on January 5, 1966, returnable to January 15, 1966, allowing Petitioner to January 22, 1966 to demur or reply to Respondents' answer, if any, and setting the matter down for hearing on January 29, 1966; upon Respondents' demurrer to said petition and Respondents' answer to said petition filed January 21, 1966; upon Petitioner's demurrer to Respondents' answer and Petitioner's reply to Respondents' answer filed January 29, 1966; and the same was argued by counsel, both orally and by brief.

Whereupon the Court took time to consider its decision and after mature deliberation of Respondents' demurrer to

the petition, is of the opinion to and doth hereby SUSTAIN Points 1, 2, 3, 4, 5, 6, 8, 9 and 10 of Respondents' demurrer to said Petition, does OVERRULE Point 11 thereof, and makes no ruling on Point 7 thereof; all for the reasons expressed in a letter memorandum of opinion of the Court dated March 11, 1966, which letter memorandum of opinion is ordered to be, and is hereby filed herein as a part of this order and made a part of the record in this cause. And having so ruled it became unnecessary to rule upon Respondents' answer or Petitioner's demurrer and reply thereto.

It is accordingly ADJUDGED, ORDERED and DECREED that:

1. The writ on mandamus prayed for in the aforesaid petition, be, and the same is hereby, denied;

2. Petitioner's prayer in the alternative as in the petition contained for other and further relief by way of declaratory judgment, be, and the same is hereby, denied;

3. The petition herein be, and it is hereby, dismissed without prejudice, and;

4. Respondents be, and they are hereby, awarded judgment against the Petitioner for their costs in their own behalf expended and a statutory fee of Ten ($10.00) Dollars.

To which action of the Court in not sustaining Points 7 and 11 of their demurrer, the Respondents, by counsel, did object and except.

And to which action of the Court in sustaining the aforesaid points of Respondents' demurrer, in denying the writ as prayed for, in denying other and further relief in the alternative by way of declaratory judgment, and in dismissing his petition, Petitioner, by counsel, did object and except for the following reasons:

1. The application by the Court to this case of Section 39, Article VI of the Constitution of West Vir-

ginia is repugnant to Section 1 of the Fourteenth Amendment to the Federal Constitution, and to the Fifth Amendment to the Federal Constitution as made applicable to the State by the Fourteenth Amendment of the Federal Constitution, in that it constitutes a denial of due process of law and a denial of the equal protection of law, deprives Petitioner of his property without due process of law, and constitutes the taking of private property for public use without compensation.

2. The State has consented to suit against Respondents by its participation of the subject highway project in the Federal Interstate Highway Program, and the application by the Court to this case of Section 35, Article VI of the Constitution of West Virginia is repugnant to the commerce clause of Section 8, Article I of the Federal Constitution, in that it constitutes an interference with and burden upon interstate commerce.

3. The inapplicability to this proceeding of Section 35, Article VI of the Constitution of West Virginia became the law of this case by virtue of the per curiam opinion of the Supreme Court of the United States rendered on Respondent's motion in appeal of Civil Action 3479 from this Court, and Respondents are judicially estopped from asserting such constitutional provision in this mandamus proceeding.

4. Petitioner's work, services, labor and material performed pursuant to the contract incorporated in the highway for public use and appropriated by Respondents, is property within the protection of the due process clause of Section 1 of the Fourteenth Amendment to the Federal Constitution and within the protection of the Fifth Amendment to the Federal Constitution as made applicable to the State by the Fourteenth Amendment, and it is a proper subject for eminent domain proceedings.

5. Petitioner has in good faith shown a reasonable cause to believe the question of his property rights, and the taking thereof, should be judicially resolved and such constitutes a clear legal right in a man-

damus proceeding to compel eminent domain proceeding.

6. The application by the Court to this case of Section 35, Article VI of the Constitution of West Virginia is repugnant to and denies Petitioner the rights guaranteed to him under Sections 9, 10, and 17, Article III of the Constitution of West Virginia.

7. The proceeding is not a suit against the State within the prohibition of Section 35, Article VI of the Constitution of West Virginia for the reasons (1) it involves the construction of a public road under contract to a private party, (2) is a proceeding to compel the performance of constitutional and statutory duties by Respondents, and (3) any expenditure that might ultimately be made on eminent domain proceeding would not come from the general revenue of the State but would come from the State Road Fund as segregated by Section 52, Article VI of the State Constitution for the express purpose of paying obligations incurred in the construction of public highways.

8. The Court's ruling is contrary to the law and the pleadings.

9. The decision of the Court in Civil Action 3479 is not res judicata as to this mandamus proceeding since the object of this proceeding and relief sought herein is not responsive to the pleading in declaratory judgment.

10. Such other reasons as Petitioner may assign on appeal.

Dated this 25th day of June, 1966.

ENTER:

FRANK L. TAYLOR, *Judge*

INSPECTED BY:

BENJAMIN A. RITCHIE
Counsel for Respondents

CARNEY M. LAYNE
CHARLES W. YEAGER
Counsel for Petitioner

APPENDIX F

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 5th day of December, 1966, the following order was made and entered, to-wit:

HOWARD PRICE d/b/a HOWARD PRICE AND COMPANY

vs.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, a Corporation, and BURL A. SAWYERS as State Road Commissioner

On a former day, to-wit, August 24, 1966, came the petitioner, Howard Price d/b/a Howard Price and Company, by Carney M. Layne and Charles W. Yeager, his attorneys, and presented to the Court his petition praying for a writ of error to a judgment of the Circuit Court of Kanawha County rendered in this case on the 25th day of June, 1966, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the writ of error prayed for is refused.

A True Copy.

Attest: KENNETH E. HINES
Clerk Supreme Court of Appeals

APPENDIX G

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 20th day of February, 1967, the following order was made and entered, to-wit:

HOWARD PRICE d/b/a HOWARD PRICE AND COMPANY

vs.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, a Corporation, and BURL A. SAWYERS as State Road Commissioner

On a former day, to-wit, January 4, 1967, came again the petitioner, Howard Price d/b/a Howard Price and Company, by Carney M. Layne and Charles W. Yeager, his attorneys, and presented to the Court his first and second petitions praying for a writ of error to a judgment of the Circuit Court of Kanawha County rendered in this case on the 25th day of June, 1966, with the record therein accompanying the petitions, and notes of argument in support thereof, which being seen and inspected by the Court the writ of error prayed for is refused on this second application.

A True Copy.

Attest: KENNETH E. HINES
Clerk Supreme Court of Appeals

APPENDIX H

Pertinent State Constitutional Provision

Constitution of West Virginia, 1872, as Amended by House Joint Resolution 6, Acts of the 45th Legislature of West Virginia, Regular Session 1941, p. 589; Chapter 11, same volume, p. 89, submitted to voters; Ratified November, 1942, adding the following new section:

ARTICLE VI

* * *

REVENUES APPLICABLE TO ROADS

§52. Revenue from gasoline and other motor fuel excise and license taxation, motor vehicle registration and license taxes, and all other revenue derived from motor vehicles or motor fuels shall, after deductions of statutory refunds and cost of administration and collection authorized by legislative appropriation, be appropriated and *used solely for construction*, reconstruction, repair and maintenance of *public highways*, and also the payment of the interest and principal on all road bonds heretofore issued or which may be hereafter issued for the construction, reconstruction or improvement of public highways, *and the payment of obligations incurred in the construction*, reconstruction, repair and maintenance *of public highways*. (Italics supplied)

APPENDIX I

PERTINENT STATE STATUTES

Chapter 17 of the Code of West Virginia, 1931, as amended by the Acts of the Legislature of West Virginia as indicated after the sections. (Note: Last official code of West Virginia published in 1931. Only official source of amendments thereto is in Legislative Acts. Michie's West Virginia Code conveniently compiles all sections and amendments thereto by the official code section, article and chapter designation).

ARTICLE 3. STATE ROAD FUND

Section 1. *There shall be a state road fund, which shall* consist of the proceeds of . . . When any money is collected from any of the sources aforesaid, it shall be paid into the state treasurer by the officer whose duty it is to collect and account for the same, and *credited to the state road fund, and shall be used only for the purposes named in this chapter, that is to say;* (a) To pay the principal and interest due on all state bonds issued for the benefit of said fund, and set aside and appropriated for that purpose; (b) to pay the expenses of the administration of the road department; (c) *to pay the cost of* maintenance, *construction,* reconstruction and improvement *of all primary roads;* (d) *to pay the cost of* maintenance, *construction,* reconstruction and improvement *of all secondary roads.* * * * (Chapter 3, Acts of the Legislature of West Virginia, 2d Extraordinary Session, 1933, p. 7; Chap. 17, Art. 3, Sec. 1 of Michie's West Virginia Code. (Italics supplied)

§2. COST OF CONSTRUCTION, RECONSTRUCTION, IMPROVEMENT AND MAINTENANCE OF STATE ROADS.—*The cost* and expense *of the construction,* reconstruction, improvement or maintenance *of all state roads shall be paid out of any moneys received by* or appropriated to *the state road commission for that purpose* (Chapter 17, Article 3, Section 2, Official Code of West Virginia, 1931, p. 390; Same, Michie's Code of West Virginia. (Italics supplied).

* * *

Section 4. METHOD OF DISBURSING ROAD FUND.—*Any claim of a contractor* or others, not otherwise provided for, *for labor done or for materials, services or supplies furnished to the state road commission,* pursuant to the provisions of any article of this chapter, *shall be audited by the commissioner, and, if found to be correct, the commissioner shall issue the*

commission's requisition upon the auditor of the State therefor, showing the nature of such claim and whether it is for labor done or materials, services or supplies furnished for construction of state roads, or for other purposes, and the auditor shall issue his warrant upon the state treasurer therefor, and the treasurer shall pay the same to the person, firm or corporation entitled thereto, out of the funds in the Treasury provided for that purpose. (Chapter 160, Acts of the Legislature of West Virginia, Regular Session 1963, p. 772; Chap. 17, Art. 3, Sec. 4 of Michie's Code of West Virginia. (Italics supplied).

ARTICLE 4. STATE ROAD SYSTEM; PRIMARY AND SECONDARY ROADS.

Section 19. CONTRACTS FOR WORK AND MATERIALS; ADVERTISING AND BIDS; SERVICES BY STATE ROAD FORCES AND PRISON LABOR.

—*All work of construction* • • • *of state roads* • • •, *and the furnishing of all materials and supplies therefor* • • • *shall be done and furnished pursuant to contract* • • • (Chapter 143, Acts of the Legislature, Regular session, 1957, p. 687, Chap. 17, Art. 4, Sec. 19 of Michie's West Virginia Code. (Italics Supplied).

Section 20. EXECUTION OF CONTRACT AND BOND BY SUCCESSFUL BIDDER; COPY FURNISHED CLERK OF COUNTY COURT; FORFEITURE OR RETURN OF CHECKS OR BONDS.—

• • • (Chapter 3, Acts of the West Virginia Legislature, Regular Session 1943, p. 78; Chap. 17, Art. 4, Sec. 20 of Michie's West Virginia Code.

Section 21. FORM OF CONTRACT; SIGNING.—

• • • (Chapter 40, Acts of the West Virginia Legislature, First Extraordinary Session 1933, p. 280; Chap. 17, Art. 4, Sec. 21 of Michie's Code of West Virginia.

APPENDIX J

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

HOWARD PRICE dba
HOWARD PRICE and COMPANY,

Petitioner,

v.

Upon Mandamus

With Other Appropriate Relief Thereunder, Including Alternatively, for Declaratory Judgment With Coercive Relief

THE STATE ROAD COMMISSION OF WEST VIRGINIA, a corporation, and BURL A. SAWYERS as State Road Commissioner,

Respondents.

PETITION

To the Hon. Frank L. Taylor, Judge of the Circuit Court of Kanawha County, West Virginia:

The Petitioner, Howard Price, dba Howard Price and Company says as follows:

This is a proceeding in mandamus brought to compel the Respondents, the State Road Commission of West Virginia, a corporation, and Burl A. Sawyers, as State Road Commissioner, to institute proceedings under eminent domain to legally acquire from the Petitioner, and to pay him just compensation for, certain property belonging to Petitioner and wrongfully taken and appropriated by the Respondents by virtue of (1) Respondents' wrongful abrogation of a certain highway construction contract between Petitioner and Respondents, and (2) Respondents' wrongful taking and appropriation for public use of work, services, labor and material performed and supplied by Petitioner and

incorporated in a highway construction project, and for which Petitioner has not been paid.

The subject matter of this proceeding is the same as in Civil Action No. 3479, styled "Howard Price dba Howard Price and Company vs. the State Road Commission of West Virginia, a corporation, and others," instituted in the Circuit Court of Kanawha County, West Virginia. In that proceeding the Petitioner sought a declaration of his rights under the highway construction contract here involved. Particularly he sought a declaration that he was not in default under the terms of said contract, and a declaration of his right to have certified by Respondents his performance of various items of work, services, labor and material as hereafter set forth. In addition, Petitioner sought coercive relief compelling the Road Commissioner to certify the performance of such work and to issue his requisition to the State Auditor for the payment thereof. In such proceeding the Respondents filed two successive motions to dismiss said declaratory judgment proceeding on the grounds the same constituted an action against the State of West Virginia within the prohibition of Section 35, Article VI of the State Constitution. The latter of said motions was sustained in whole, and the proceeding dismissed.

On appeal to the Supreme Court of Appeals of West Virginia the petition for review was denied. Petitioner then appealed to the Supreme Court of the United States. The ground for such appeal was that the application of said State constitutional provision to the facts of this case deprived Petitioner of his property for public use without due process of law, and denied him a day in Court, in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution and in violation of the Fifth Amendment to the Federal Constitution as made applicable to the States by said Fourteenth Amendment. The respondents, appearing by the Attorney General of this State, filed a motion to dismiss and represented to said Court that the

Petitioner had an adequate remedy through the institution of proceedings in mandamus to compel the Respondents to institute proceedings under eminent domain to ascertain just compensation for the property taken from Petitioner. The Supreme Court of the United States by per curium opinion at the October Term, 1965, dismissed the appeal in "light of the representations of the Attorney General of West Virginia that there is open to appellant an effective state procedure of which he has not availed himself," — U.S. —, 15 L Ed. 2d 8, 86 S Ct —. Such prior proceeding is here pleaded so that the Court may take judicial notice thereof, and there is attached hereto marked Exhibit A, and made a part hereof, the same as if verbatim copied herein, pertinent portions of the record of such prior proceeding.

Petitioner now avails himself of such procedure as represented by the Attorney General, and the subdividing titles being placed for convenience of reference only, further says as follows:

I

THE DEFENDANTS

A.

1. That the Respondents, the State Road Commission of West Virginia, sometimes hereafter referred to as "Road Commission", is a statutory corporation created and existing under and by virtue of Chapter 17, Article 2 of the Code of West Virginia, 1931, as amended; that the office of State Road Commissioner was created and exists under and by virtue of Chapter 17, Article 2A of the Code aforesaid; that the Respondent Burl A. Sawyers as State Road Commissioner of West Virginia, sometimes hereafter referred to as "Road Commissioner", has been duly appointed and is presently acting as such; that by virtue of Chapter 17 of the Code aforesaid, the Road Commission and Road Commissioner are authorized to construct public roads and enter into contracts therefor and to institute,

prosecute, defend, suits, actions and proceedings and to otherwise exercise all powers, and functions necessary and germane to its public corporate existence and purposes; and by virtue of Chapter 17, Article 3, Section 4 of said Code, it is the duty of the Road Commissioner to audit the claims of contractors and for those found correct to issue requisitions upon the State Auditor for payment thereof from the constitutionally established State Road Fund.

2. That said Road Commission and Road Commissioner are respectively a public instrumentality and a public official of the State and charged with the solemn duty to abide by and uphold the Constitution of this State and of the United States, and in the performance of their duties to so act and conduct themselves in such manner as not to deprive any person of life, liberty or property without due process of law as required by Section 1 of the Fourteenth Amendment to the Federal Constitution, and Section 10, Article III of the State Constitution, nor to take private property for public use without just compensation as required by the Fifth Amendment to the Federal Constitution (as made applicable to the States by the Fourteenth Amendment as aforesaid), and Section 9, Article III of the State Constitution; and all references hereafter to said Federal Constitutional provisions shall be taken to include reference to the aforesaid similar State Constitutional provisions. In pursuance of the duties aforesaid, it is the further duty of said Road Commission and Road Commissioner, to institute proceedings under the authority of eminent domain to legally acquire and to pay just compensation for private property taken and appropriated by them for public use."

II

THE CONTRACT

A.

1. That the Road Commission, acting through Patrick C. Graney, the then Road Commissioner for the State of West Virginia, did after bid award, enter into a contract, here-

after referred to as "contract", with the Petitioner, Howard Price dba Howard Price and Company, for the grading and draining of a certain portion of the roadway known as Interstate Highway 64, located in Cabell County, West Virginia, and more particularly designated as Project Number 1-64-1 (37) 22, Cabell County, hereafter referred to as "project", and which said contract is dated August 12, 1960; that the contract documents consists of (1) the contract instrument, (2) the contractor's proposal, (3) the Standard Specifications, Roads and Bridges, of the State Road Commission of West Virginia, Adopted 1952, (4) the Special Provisions to said contract and amendments and revisions to said Standard Specifications, (5) the contract bond, and (6) the drawings and plans for said project, a copy of each of which, except the drawings and plans, was attached to the Complaint in the previous proceedings and is included herewith as part of Exhibit A.

2. The aforesaid Interstate Highway 64 is a part of the national highway system promoted by the Federal Government. On the construction thereof the Federal Government furnishes participating funds to the Road Commission to the extent of 90% of the cost thereof, including that of the project here involved.

3. Upon the signing of said contract by the parties the Petitioner did acquire a right of property therein within the meaning of the protection of Section 1 of the Fourteenth Amendment and the Fifth Amendment to the Federal Constitution, and it became and then and thereafter was the duty of the Road Commission and Road Commissioner to accord to Petitioner the protection of said contract guaranteed by the Federal constitutional provisions aforesaid, and not to deprive Petitioner of his right of property therein without due process of law nor take and appropriate such right of property for public use without just compensation.

B.

1. Said Contract was by bid, and was entered into upon the basis of unit prices for estimated quantities, hereafter referred to as "estimated quantities", of items of work, services, labor and material, as estimated by the Road Commission, and the total estimated contract price, based on estimated quantities was $1,352,235.48; that said estimated quantities were subject to the requirements of the project, being either more or less than estimated, and the total estimated contract subject to being adjusted on the basis of the agreed unit prices for its quantities actually required.

C.

1. Said contract provided, among other things, as follows;

(1) That the performance of all items of work would be under the supervision and control of the Road Commission through its Engineer, and that the Road Commission would have the right to suspend work for various reasons, including failure of Petitioner to obey and carry out orders of the Road Commission personnel (Standard Specifications, Sec. 1.5.1, p. 16; Sec. 1.8.4., p. 31).

(2) That the Road Commission would each month estimate the amount of work performed by Petitioner and compute the value thereof from the unit prices, and after deducting 5% retainage, pay Petitioner therefor once a month for the work performed in the preceding month (Contract, Paragraph 10).

(3) That the Road Commission, subject to certain qualifications, would have the right to increase the quantities of work as may be necessary to complete the project, and that Petitioner would perform any such item at the same price as that bid upon the original quantity (Standard Specifications, Sec. 1.4.2, p. 12).

(4) That for any item not included in the original contract there might be executed a supplemental agreement at a price thereof agreed by the parties as a fair and reasonable price (Standard Specifications, Sec. 1.4.2, p. 12).

2. Inherent in such contract was the duty of Respondents to cooperate with Petitioner in its execution, and to act in good faith, and not to obstruct, hinder or render impossible the performance by Petitioner.

3. Each of the items of work covered by said contract included both the material concerned in said item and the work, services and labor required to put said item in place, or as the case may be, to remove it, and that among, but not all, said items are the following:

(1) Item 3-A, Borrow Excavation, the estimated quantity of which, as determined by the Road Commission as necessary for said project, was 22,950 cubic yards, for which Petitioner bid and contract price was Seventy-Two Cents (72¢) per cubic yard; and which borrow is earth material secured by the contractor from off the right-of-way, measured in the "cut" of its removal, and used on the right-of-way as fill material.

(2) Item 125, Special Rock Fill, the estimated quantity of which, as determined by the Road Commission as necessary for the project, was 278,111 cubic yards, for which Petitioner's bid and contract price was Seventy-Two Cents (72¢) per cubic yard; and which Special Rock Fill is rock secured by the contractor either on or off the right-of-way, and which is measured in the "fill" (which is in place on the roadway) and used on the right-of-way as fill material of special quality.

(3) Item 2, Unclassified Excavation, the estimated quantity of which, as determined by the Road Commission as necessary for the project, was 1,525,000 cubic yards; for which Petitioner's bid and contract price was Forty-Nine Cents (49¢) per cubic yard; and which unclassified excavation is material cut from the roadway area and measured in the "cut" of its removal, and when suitable, is used in the fills, and if unsuitable, is "wasted", that is, disposed of off of the project.

(4) The following miscellaneous items of the following estimated quantities and bid prices:

ITEM NO.	DESCRIPTION	ESTIMATED QUANTITY	UNIT BID PRICE
6 A	Structure Excavation	19,263 CY	$ 2.25
71	Class A Concrete	891 CY	55.00
107	Cr. Stone, Sand or Gravel for Underdrain	2,322 CY	7.50
107 A	Cr. Stone, Sand or Gravel for Culvert Foundation	8,509 Tons	4.50
127 A	Maintaining Traffic	Lump Sum	5,000.00
131 C	Temporary Fence	8,500 LF	.15
136	Engineer Field Office	Lump Sum	3,000.00
138	Construction Layout Stakes	Lump Sum	10,000.00
42-C	24" Paved Invert CMP 14-GA	4,946 LF	6.75

4. The contract provides for the performance of extra work as directed by the Road Commission and the payment thereof at a fair and reasonable price. That work, services and labor involved in blending certain materials with other materials to reach a degree of suitability for the purpose of fills, is not included under the item of Unclassified Excavation, and if not separately itemized in the contract, and later required, is a special item and proper subject for change order and payment under a supplemental agreement. That similarly under said contract, work services and labor involved in standing-by and holding equipment subject to the order of the Road Commission, is a special item and proper subject for payment of equipment rental and stand-by expense under a supplemental agreement.

III

CONDITIONS UNDER WHICH PERFORMANCE OF CONTRACT WAS HAD

A.

1. Petitioner says that on or about September 6, 1960 he commenced the performance of said contract and on September 11, 1962 his work was arbitrarily and wrongfully terminated by the Road Commission; and that at that time he had performed approximately 80% of the original contract plus overruns and his working time was unexpired.

2. That the supervision and control of Petitioner's work was under the Project Engineer (who reported to the Area Engineer), the Area Engineer (who reported to the Assistant District Engineer), the Assistant District Engineer (who reported to the District Engineer), the District Engineer (who reported to the Construction Director), the Regional Engineer (who also reported to the Construction Director), and the Construction Director of the Road Commission itself. That for some time prior to November, 1961, Petitioner was receiving direct from the various echelons of the Road Commission engineering personnel, contradictory and confused directions and orders, which directions and orders were arbitrarily and capriciously issued, allegedly under Respondents' right of supervision and direction as provided in the contract, and were under threats, express and implied, of work suspension for non-compliance, until matters reached such stage that Petitioner did not know whose directions to follow.

3. Through said period and because of the delays of the Road Commission personnel, it was impossible to satisfactorily proceed, and Petitioner's equipment and work force were unable to work effectively on the project. At the direction of the Construction Director, the project was closed down on or about November, 1961, until proper direction might be supplied. The project remained closed down until the latter part of April, 1962.

4. Shortly before the work resumption in the latter part of April, 1962, at a conference held on April 4, 1962, it was agreed that Petitioner would blend with Borrow the silty material hereafter referred to in Paragraph VI B., remove certain portions of the special Rock Fill, with reservation of his rights thereunder, as referred to in Paragraph V A., and proceed with several minor items, and the Road Commission agreed that it would take the necessary steps to immediately pay Petitioner for the Borrow, referred to in Paragraph IV B. and C.; that Petitioner proceeded according to each particular of his agreement under the direction and supervision of Road Commission personnel, and to their complete satisfaction, until he had reached the point at which in the orderly progress of work and proper sequence of performance, he had to obtain more Borrow material to place in the fill and to be allowed by the Road Commission to travel onto the adjoining project to obtain more Special Rock Fill. Petitioner was again delayed by the arbitrary inaction of the Road Commission and its personnel, and his equipment and work force were unable to work effectively while awaiting Respondents' decisions, and such continued until the Respondents wrongfully and arbitrarily terminated Petitioner's contract.

IV

BORROW EXCAVATION

A.

1. The 22,950 yards of Borrow as originally estimated by the Road Commission was insufficient for the completion of the project, and Petitioner says that the project required approximately 190,835 cubic yards; that the Road Commission further determined that additional material of a Borrow nature was required, which it classified as Random Borrow, an item of material not listed in the contract, and the Road Commission estimated the amount of Random Borrow required as being approximately 35,000 cubic yards,

and that the Road Commission and Petitioner agreed that a fair and reasonable price therefor was the sum of $1.50 cubic yard.

B.

1. In the spring of 1961, Petitioner advised the Road Commission that the Borrow required would exceed the estimated quantity and the Road Commission through the Construction Director, on October 6, 1961 prepared a change order increasing the estimated quantity of Borrow, and forwarded it to the Petitioner. The change order was signed by Petitioner and his Surety and returned to the District Engineer, and thereafter forwarded to the Construction Director. That after said order was received by the Construction Director, he prepared another in its place for the stated reason some change was required in the contents and such new change order was passed through channels, signed by Petitioner, his Surety, and the District Engineer and returned to the Construction Director, where again the same action was arbitrarily repeated and the same sequence of events followed. Petitioner signed approximately five such change orders, all covering the same matter of quantity of Borrow, the last of which change orders was dated July 6, 1962.

2. A short time previous to the time of the last change order on Borrow, the Construction Director also prepared and sent to Petitioner a supplement agreement on Random Borrow. This agreement provided for a price of $1.50 per cubic yard as agreed upon between the Road Commission and Petitioner. The supplemental agreement was on June 15, 1962, likewise signed by Petitioner, his Surety and the District Engineer, and returned to the Construction Director.

3. The Construction Director, during the period covered by the execution of the change orders, did not furnish Petitioner a signed copy of any of the change orders for the

stated reason that a new and superseding one was to be issued, and in the summer of 1962 shortly before and at the time of the alleged default, arbitrarily refused to furnish Petitioner any signed copy of a change order on Borrow or a signed copy of the supplemental agreement on Random Borrow.

C.

1. After the execution of the first change order by Petitioner, his surety, and the District Engineer, and pursuant to the right of supervision and control by Respondents as provided in the contract, Petitioner was directed by Respondents, to borrow in excess of the originally estimated quantity and to place the additional amounts in the roadway, which Petitioner did and continued to do, according to the specifications, as necessary for the roadway construction, and under the inspection and at the insistence of the Road Commission. Petitioner placed therein approximately 69,975 cubic yards of Borrow in addition to the estimated quantity of 22,950 cubic yards, of value at bid price in the amount of $64,377.

2. That Petitioner's work, services, labor and materials comprehended under the item of "Borrow" were property within the guarantees of the Federal constitutional provisions aforementioned, and upon the performance and supplying thereof, it became and was thereafter the duty of Respondents not to deprive Petitioner of his rights of property therein without due process of law, nor take and appropriate such for public use without just compensation.

V

SPECIAL ROCK FILL

A.

1. Petitioner secured sources of material suitable for Special Rock Fill, and while under the contract no test of suitability of Special Rock Fill was required other than visual

inspection, nevertheless Respondents had said material examined by laboratory analysis, found it suitable, and approved it for use as Special Rock Fill. On November 4, 1960, Petitioner commenced the performance of this item and placed said Special Rock Fill at the locations called for, with the approval and under the direction and supervision of Respondents acting through their duly authorized personnel. The performance of said work was included in the monthly estimates, certified by the Respondents, approved for payment, and paid for (less retainage) by the Respondents. After approximately 100,000 cubic yards of this item had been so placed by Petitioner, the Respondents arbitrarily claimed a part thereof was not suitable for Special Rock Fill, when in fact it was suitable, and arbitrarily directed Petitioner to remove 51,442 cubic yards thereof, under threat of suspending work on the project if not complied with. After objecting and reserving his rights, Petitioner removed said 51,442 cubic yards. After the removal of said rock, the Respondents, on the payment of the next monthly estimate arbitrarily and wrongfully deducted from the amount due Petitioner for other items of work performed by him, the sum of $37,038.24, representing the 51,442 cubic yards of Special Rock Fill for which the Respondents had previously paid and then required Petitioner to remove.

2. The removal of said rock was a special item and the proper subject for supplemental agreement which Respondents refused to furnish. The cost or removing said rock was in excess of the cost of its placement, and a reasonable and fair price and value for such removal is $2.00 per cubic yard, for a total sum of $102,884. Petitioner says that under the contract he has a right to be paid the said sums of $37,038.24 and $102,884.00.

3. Petitioner placed a total of 160,103 cubic yards of Special Rock Fill, not including the 51,442 cubic yards placed and removed as aforesaid. Of such 160,103 cubic yards, Pe-

titioner has been paid (less retainage) for 123,558 cubic yards only; that Petitioner has not been paid for the balance of 36,545 cubic yards, which at bid price is of the value of $26,312.40, and that under the contract he has a right to be paid said sum of $26,312.40.

4. That Petitioner's work, services, labor and material comprehend under the item of "Special Rock Fill", including both the fill and extra work in removing part thereof, were property within the guarantees of the Federal constitutional provisions aforementioned, and upon the performance and supplying thereof, it became and was thereafter the duty of Respondents not to deprive Petitioner of his right of property therein without due process of law, nor take and appropriate such for public use without just compensation.

B.

1. To replace the said 51,442 cubic yards removed from the Special Rock Fill, and to complete the performance of the item of Special Rock Fill, the Road Commission by laboratory analysis approved certain material located partly on and partly off the adjoining highway project, hereafter referred to as "Robertson-Fowler project". The quantity which was partly off said adjoining Robertson-Fowler project was accessible only from said adjoining project. Respondents agreed to make a partial acceptance of the roadway area, and agreed that Petitioner could traverse part of such roadway area to secure the material. Notwithstanding said agreement, in the summer of 1962, when the contractor on the Robertson-Fowler project had completed the phases of work necessary to allow Petitioner to traverse part of the roadway to the material source, Respondents arbitrarily and wrongfully refused to allow Petitioner access to the material.

VI

UNCLASSIFIED EXCAVATION AND BLENDING

A.

1. Under the direction and order of the Respondents, issued pursuant to their right of supervision and control as provided in the contract, Petitioner excavated a total of 1,676,369 cubic yards of unclassified excavation and has been paid (less retainage) for 1,377,570 cubic yards thereof. Petitioner has not been paid for the balance of 298,799 cubic yards, which at bid price is of the value of $146,411.51, and Petitioner says that under said contract he had a right to be paid $146,411.51 therefor.

2. That Petitioner's work, services, labor and materials comprehended under the item "Unclassified Excavation", were property within the guarantees of the Federal constitutional provisions aforementioned, and upon the performance and supplying thereof, it became and was thereafter the duty of Respondents not to deprive Petitioner of his right of property therein without due process of law, nor take and appropriate such for public use without just compensation.

B.

1. That under the arbitrary and capricious direction and order of Respondents, under threat of shut-down for non-compliance, Petitioner was required to place in the fill, material from unclassified excavation which was silty, of high water absorption and without compaction. Respondents, perceiving the fill material was unsuitable, then required Petitioner to place suitable material in the fill, and in attempting to up-grade such material and give it some binding and compacting quality, arbitrarily directed and ordered Petitioner, under threat of shut-down for non-compliance, to mix and blend the silty unsuitable material with suitable Unclassified Excavation or with Borrow secured

from off the project. Such blending was a special item of extra work for which Respondents instituted but refused to finalize a proper change order and supplemental agreement. The reasonable and fair price and value of such blending is Fifty Cents (50¢) per cubic yard; and Petitioner was compelled to blend approximately 312,600 cubic yards of a total value of $156,300, and Petitioner says that under the contract he has a right to be paid the sum of $156,300 therefor.

2. That Petitioner's work, services, labor and material comprehended in the performance of Blending, were property within the guarantees of the Federal constitutional provisions aforementioned, and upon the performance and supplying thereof, it became and thereafter was the duty of the Respondents not to deprive Petitioner of his right of property therein without due process of law, nor take and appropriate such for public use without just compensation.

VII

EQUIPMENT RENTAL AND OTHER EXPENSE

A.

1. During the numerous delays and after the project was closed down in November, 1961, and after resumption of work in April, 1962, and during the further delays occasioned by Respondents arbitrary refusal to provide a Borrow change order as alleged in Paragraph IV B., and their arbitrary refusal to allow Petitioner to traverse a portion of the Robertson-Fowler project so as to secure Special Rock Fill, as alleged in Paragraph V B., much of Petitioner's equipment and work force were unable to work effectively as a direct and proximate result of Respondents' aforesaid arbitrary and capricious acts. The Respondents were notified of Petitioner's charge for equipment rental and other expenses and that he did not expect to be charged with working time for the periods in which he had been

delayed by Respondents. The Equipment rental and stand-by expense were part of the cost of said project and were special items and proper subject for payment under a supplemental agreement, and which Respondents refused to furnish. The reasonable and fair price and value of the use of Petitioner's equipment properly chargeable to Respondents is $681,881.57, and the reasonable and fair price of other stand-by services rendered by Petitioner and properly charged to Respondents, is $95,000; and Petitioner says that under the contract he has a right to be paid said sums of $681,881.57 and $95,000.

2. That Petitioner's services in holding said equipment subject to the order of Respondents and standing-by, were property within the guarantees of the Federal constitutional provisions aforementioned, and upon the performance and supplying thereof, it became and thereafter was the duty of Respondents not to deprive Petitioner of his right of property therein without due process of law, nor take and appropriate such for public use without just compensation.

VIII

MISCELLANEOUS ITEMS PERFORMED AND UNPAID

A.

1. The following miscellaneous items, as referred to in Paragraph II C 3(4), have been performed by Petitioner in the quantities indicated. All of the quantities are within the estimated quantities, and at bid price are of the value indicated, and Petitioner has not been paid the sums due for the quantities indicated:

Item No.	Description	Unit Bid Price	Total Quantity Performed	Quantity Unpaid	Amount
6A	Structure Excavation	$ 2.25CY	13,169CY	3,216	$7,236.00
71	Class A Concrete	55.00CY	891CY	16	880.00
107	Cr. Stone, Sand or Gravel for Underdrain	7.50CY	1,046CY	486	3,645.00

Item No.	Description	Unit Bid Price	Total Quantity Performed	Quantity Unpaid	Amount
107A	Cr. Stone, Sand or Gravel for Culvert Foundation	Tons 4.50	Tons 8,509	459	2,065.50
127A	Maintaining Traffic	Lump Sum $ 5,000.00	100%	100%	5,000.00
131C	Temporary Fence	.15 CF	8,500 LF	2,433	364.95
136	Engineer Field Office	Lump Sum 3,000.00	100%	33⅓%	999.00
138	Construction Layout Stakes	Lump Sum 10,000.00	100%	30%	3,000.00
42-C	24" Paved Insert CMP 14 GA	6.75 LF	2,031 LF	1,064	7,182.00

Petitioner says that under the contract he had a right to be paid the sums so indicated totaling $28,306.95.

2. That Petitioner's work, labor, services and material comprehended in each of the above items were property within the guarantees of the Federal constitutional provisions aforementioned, and upon the performance and supplying thereof, it became and thereafter was the duty of the Respondents not to deprive Petitioner of his right of property therein without due process of law, nor take and appropriate such for public use without just compensation.

IX

RETAINAGE HELD

A.

1. During the progress of the work the Road Commissioner certified the performance of part thereof, including some of the items heretofore mentioned, but for convenience herein set apart separately, upon which certification was issued on monthly estimates less five (5%) per cent retainage, and for which the Road Commissioner issued requisitions upon the State Auditor for the payment therefore less said retainage. That said items, the quantity thereof so certified for payment, the unit prices, and totals paid (less retainage), are as follows:

Items	Unit Price	Quantity Certified	Total Price
Clearing and Grubbing	$ 100.00	98 AC	$ 9,800.00
Unclassified Excavation	.49	1,377,570 CY	675,009.30
Borrow Excavation	.72	22,950 CY	16,524.00
Structure Excavation	2.25	9,950 CY	22,387.50
Crusher Run Stone Base	4.50	1,462 Tons	6,579.00
24" Paved Inv. C.M.P. (Fully Coated) 14 Gage	6.75	1,103 LF	7,445.25
30" Paved Inv. C.M.P. (Fully Coated) 14 Gage	8.50	206 LF	1,751.00
36" Paved Inv. C.M.P. (Fully Coated) 12 Gage	11.50	174 LF	2,001.00
42" Paved Inv. C.M.P. (Fully Coated) 12 Gage	15.00	160 LF	2,400.00
48" Paved Inv. C.M.P. (Fully Coated) 8 Gage	22.00	242 LF	5,324.00
18" x 11" Paved Inv. C.M.P. Arch With Intgs. Base (FC) 14 Gage	4.50	140 LF	630.00
Class "A" Concrete	55.00	875 CY	48,125.00
Reinforcing Steel Bars	.13	216,000 LB	28,080.00
8" Plain Con. Pipe Perf.	1.35	1,888 LF	2,548.80
Crushed Stone & Sand (Underdrain)	7.50	559 CY	4,192.50
Crushed Stone (Culvert)	4.50	8,050 Tons	36,225.00
Special Rock Fill	.72	128,558 CY	88,961.76
Water for Spec. Comp. & Dust Pal.	2.00	471 MG	942.00
Temp. Fence	.15	6,067 LF	910.00
Engineering Field Office	3,000.00	66.7 %	2,001.00
Construction Layout Stakes	10,000.00	70.0 %	7,000.00
Change Order No. 1 42" Paved Inv. C.M.P. (Fully Coated) 12 Gage	15.00	58 LF	870.00
Force Account No. 1	990.43		990.43
Change Order No. 2 (steel)			
TOTAL AMOUNT			$970,697.59
Five Percent (5%) Retained			48,534.88

That the total amount retained therefor was $48,534.88. Petitioner says that under the contract he had the right to be paid the retainage therefor totalling $48,534.88. Petitioner further says that said retainage represents five per cent (5%) of the work, services, labor and material comprehended in said items so certified.

2. That Petitioner's work, services, labor and material comprehended in the aforesaid five percent (5%) of each of the above items so certified, were property within the guarantees of the Federal Constitutional provisions aforementioned, and upon the performance and supplying thereof

and the abrogation of Petitioner's contract by Respondents, it became and thereafter was the duty of the Respondents not to deprive Petitioner of his right of property therein without due process of law nor take and appropriate such for public use without just compensation.

X

THE ALLEGED DEFAULT

A.

1. In July, 1962, Respondents advised Petitioner that the progress on the work had not been satisfactory, and threatened to take the project from Petitioner. All of Respondents objections to Petitioner's work were without substance. By letter dated August 21, 1962, Respondents notified Petitioner that they had defaulted his contract.

2. Respondents shortly thereafter arbitrarily refused to provide payment to Petitioner for the Borrow which Respondents had previously directed Petitioner to place in the project; and arbitrarily forbid him to do any of the other items of work which it was Petitioner's right to prosecute; and arbitrarily demanded that Petitioner forthwith proceed with replacing the Special Rock Fill which it had improperly ordered him to remove; and Respondents having theretofore agreed to take steps to allow Petitioner on a portion of the adjoining project so that Special Rock Fill material could be obtained therefrom, refused to do so; that Respondents of their own volition resampled the source on the adjoining project which it had previously approved as suitable, and arbitrarily declared it unsuitable, when in fact it was suitable; that Petitioner had no approved material which he could immediately place in the Special Rock Fill; that Respondents then ordered Petitioner from the project, and when he continued to work the items which could still be performed, removed the Project Engineer so he could proceed no further.

B.

1. Petitioner claims that Respondents were without right or authority in holding Petitioner to be in alleged default of said contract, and in ordering Petitioner from the project, and that in so doing they acted arbitrarily and capriciously for the following reasons:

(1) That by wrongfully, arbitrarily and capriciously refusing to provide Petitioner with Borrow change orders, and by refusing to pay Petitioner for the Borrow which he had placed in said roadway under the direction and supervision of Respondents, Respondents, were in default of the contract in a manner which rendered impossible Petitioner's further performance of the work.

(2) That by wrongfully, arbitrarily and capriciously compelling Petitioner, under threat of shut-down for non-compliance, to blend unsuitable material with suitable material in an attempt to upgrade its quality, and without providing for payment to him for such operation, Respondents were in default of the contract in a manner which rendered impossible Petitioner's further performance of the work.

(3) That by wrongfully, arbitrarily and capriciously compelling Petitioner, under threat of shut-down for non-compliance, to remove 51,442 cubic yards of Special Rock Fill as unsuitable material, which material was in fact suitable, and which Respondents had previously approved and had directed and supervised its placement, without providing for payment to Petitioner for such removal, and in backcharging him for the amount already paid for its placement, Respondents were in default of the contract in a manner which rendered impossible Petitioner's further performance of the work.

(4) In wrongfully, arbitrarily and capriciously compelling Petitioner, under threat of shut-down for non-compliance, to immediately proceed with replacing the Special Rock Fill, to the exclusion of the other items of work, the performance of which was his right, and after Petitioner had already once placed

such fill with suitable material, Respondents were in default of the contract in a manner which rendered impossible Petitioner's further performance of the work.

(5) That by wrongfully, arbitrarily and capriciously delaying Petitioner in his performance of the work, Respondents were in default of the contract in a manner which rendered impossible Petitioner's further performance of the work.

(6) In inducing Petitioner to rely on traversing part of the adjoining project so that he might secure Special Rock Fill, and then wrongfully, arbitrarily and capriciously precluding him from securing it and immediately demanding that he forthwith replace the Special Rock Fill, the Respondents failed to cooperate and were in default of the contract in a manner which rendered impossible Petitioner's further performance of the work.

(7) That by wrongfully, arbitrarily and capriciously refusing to pay Petitioner for all of the Unclassified Excavation, and for the work performed as set forth in Paragraph II C 3 Subparagraph (4), Respondents were in default of the contract in a manner which rendered impossible Petitioner's further performance of the work.

And although requested so to do, Respondents wrongfully refused to rescind their notice of alleged default.

C.

1. Petitioner says Respondents had no right or authority to abrogate his contract and that the same was done wrongfully, arbitrarily and capriciously, and that Petitioner had the right to complete said contract and that the same would have been completed by him but for the arbitrary and capricious actions of Respondents.

2. Petitioner further says that under the contract Respondents were without right or authority in failing to certify, and had a duty to certify, the performance of the items of work, services, labor and materials performed and

supplied by him, and the amounts due therefor, as referred to in the number paragraphs above:

Paragraph	IV, C 1	$ 64,377.00
Paragraph	V, A 2	37,038.24
Paragraph	V, A 2	102,884.00
Paragraph	V, A 3	26,312.40
Paragraph	VI, A 1	146,411.51
Paragraph	VI, B 1	156,300.00
Paragraph	VII, A 1	681,881.57
Paragraph	VII, A 1	95,000.00
Paragraph	VIII, A 1	28,306.95
Paragraph	IX, A 1	48,534.88
TOTAL		$1,387,046.55

And Petitioner says that under the contract he has a right to be paid the said sum of $1,387,046.55 for the work, services, labor and materials performed and supplied by him and incorporated in the public highway as hereinabove set forth; that the Respondents have no right or authority to withhold payment of the above sums for such work, services, labor and materials, and have a duty to certify and issue requisitions for the payment thereof upon the State Auditor; and that the same has not been done and that the same have not been paid; the same is past due and owing from Respondents to Petitioner, and although payment has been requested, the Respondents have denied Petitioner's right to payment and have refused certification of the performance and the issuance of requisitions for payment thereof upon the State Auditor, and that said services, labor and materials are of the value of $1,387,046.55.

3. Petitioner further says that he has a right of property in the contract aforesaid and in its completion, and a right of property in all of the work, services, labor and materials performed by him and incorporated in the public highway, and that Respondents, NOTWITHSTANDING their duties not to deprive Petitioner of his property without due process and not to take such property for public use without just

compensation as guaranteed by the Federal constitution provisions aforementioned, did wrongfully abrogate said contract and deprive Petitioner of his property right therein, and did wrongfully take and appropriate his work, services, labor and materials incorporated in the public highway and deprive Petitioner of his property therein without due process and did take same for public use without just compensation in violation of the Federal constitutional provisions aforementioned, and NOTWITHSTANDING Respondents' further duty, in the premises of the duties aforesaid, to institute proceedings under the authority of eminent domain to legally acquire and to pay just compensation for private property taken and appropriated by them for public use, Respondents although requested so to do, have refused to perform their duty to institute proceedings in eminent domain to legally acquire such property from Petitioner and pay him just compensation therefor.

PRAYER

WHEREFORE, your Petitioner prays that a writ of mandamus be issued, directed to The State Road Commission of West Virginia, a corporation, and Burl A. Sawyers, as State Road Commissioner, commanding them forthwith to institute in the Circuit Court of Cabell County, West Virginia, a proceeding to acquire from Petitioner under the authority of eminent domain, the following property belonging to Petitioner:

1. Petitioner's rights in the contract aforementioned;
2. Petitioner's work, services, labor and materials incorporated in the public highway in Cabell County, West Virginia, and taken and appropriated by Respondents for public use, and being abbreviatedly described in the terms of said contract as follows:
   a. 69,975 cubic yards of Borrow, referred to in Paragraph IV C 1 hereinabove
   b. 51,442 CY of Special Rock Fill referred to in Paragraph V A 1

c. Removal of 51,442 CY of Special Rock Fill, referred to in Paragraph V A 1

d. 36,545 CY of Special Rock Fill, referred to in Paragraph V A 3

e. 298,799 CY of Unclassified Excavation referred to in Paragraph VI A 1

f. 312,600 CY of Blending referred to in Paragraph VI B 1

g. Rental of Equipment referred to in Paragraph VII A 1

h. Stand-by Services, (exclusive of equipment rental), referred to in Paragraph VII A 1

i. 3,216 CY Structure Excavation referred to in Paragraph VIII A 1

j. 16 CY Class A Concrete referred to in Paragraph VIII A 1

k. 486 CY Crushed Stone, Sand or Gravel in Underdrains referred to in Paragraph VIII A 1

l. 459 tons Crushed Stone, Sand or Gravel for Culvert Foundation, referred to in Paragraph VIII A 1

m. 100% Services Maintaining Traffic referred to in Paragraph VIII A 1

n. 2,433 LF Temporary Fence, referred to in Paragraph VIII A 1

o. 1/3 of Services Maintaining Engineer Field Office referred to in Paragraph VIII A 1

p. 30% of Construction Lay-out Stakes referred to in Paragraph VIII A 1

q. 1,064 LF of 24" Paved Invert CMP 14 ga. as referred to in Paragraph VIII A 1

r. 5% of Aggregate of items and quantities thereof certified for payment as referred to in Paragraph IX A 1

and to that end a rule may be issued against them commanding them to appear before this Court on the 15th day of January, 1966, and show cause, if they or either of them can, why they should not do so; and grant unto your Petitioner such other and further relief as the Court may deem proper and as the law may require, and as in duty bound your Petitioner will ever pray, etc.

And for such other and further relief so aforesaid, Petitioners pray in the alternative, that in the event the remedy of mandamus to compel the Road Commissioner to institute proceedings in eminent domain as represented by the Attorney General of the State to the United States Supreme Court as being a proper and available remedy, be deemed improper and unavailable by the Court, that the petition herein be taken and treated as a proceeding for declaratory judgment under Article 13, Chapter 55 of the Code of West Virginia, 1931, as Amended, and Rule 57 of the Rules of Civil Procedure, and that the Court will:

1. Declare that said contract is not in default by Petitioner;
2. Declare the rights of the Petitioner under and in said contract;
3. Declare the right of Petitioner to have the Road Commissioner certify the performance of said quantities of work, services, labor and material which are completed, unpaid, and appropriated for public use, and issue a requisition for the payment thereof upon the State Auditor;

and for further and coercive relief;

1. That the Road Commissioner be compelled to cancel and set aside for naught any such part of the records of the Road Commission as may show said contract in default;
2. That the Road Commissioner be compelled to perform his duty to certify the performance of the work, services, labor and materials performed and supplied by Petitioner and the amount due therefor, and be

compelled to issue the requisition of the Road Commission to the State Auditor for payment thereof; and

3. For such other and further relief, both general and special, as to the Court may seem appropriate in the premises of this alternative prayer.

HOWARD PRICE dba
HOWARD PRICE AND COMPANY
Petitioners
By Counsel

CARNEY M. LAYNE
638 Fifth Avenue
Huntington, West Virginia

CHARLES W. YEAGER
608 Kanawha Valley Building
Charleston, West Virginia
Counsel for Petitioner

STATE OF WEST VIRGINIA
COUNTY OF CABELL, to wit:

Howard Price, dba Howard Price and Company, the Petitioner named in the foregoing petition, being duly sworn, says that the facts and allegations therein contained are true, except as far as they are therein stated to be on information, and that so far as they are therein stated to be on information, he believes them to be true.

/s/ HOWARD PRICE
HOWARD PRICE dba
HOWARD PRICE AND COMPANY

Taken, sworn to and subscribed before me this 14th day of December, 1965.

My Commission expires March 19, 1969.

/s/ L. J. MESSEL
Notary Public